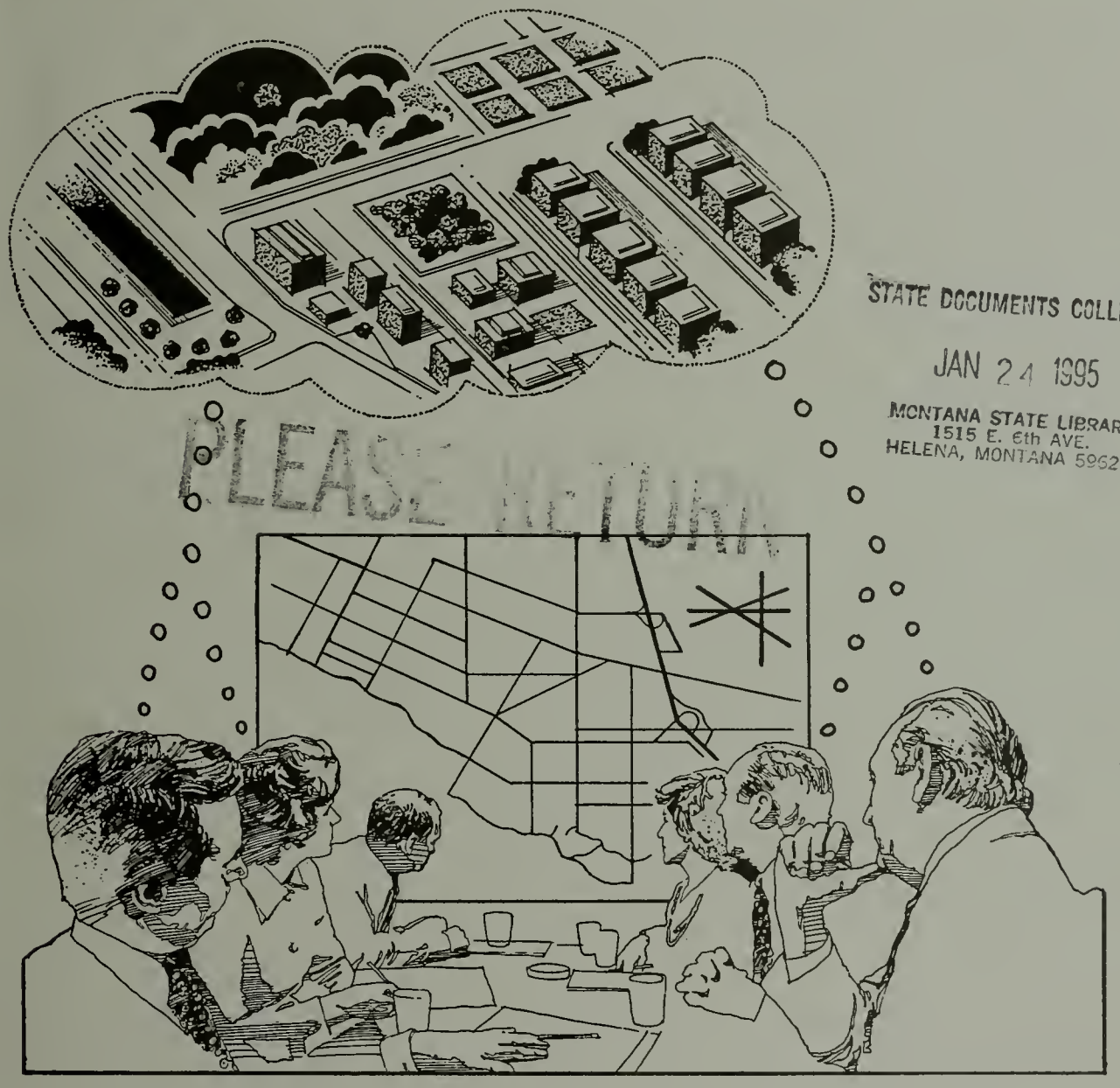
A HANDBOOK ON LOCAL LAND USE REGULATION



MONTANA DEPARTMENT OF COMMERCE
Local Government Assistance Division
Community Technical Assistance Program

August, 1994

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August, 1994

THIS ADVISORY TECHNICAL ASSISTANCE PUBLICATION HAS BEEN DEVELOPED BY THE MONTANA DEPARTMENT OF COMMERCE WITH PARTIAL FUNDING FROM THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) UNDER THE HUD 107 GRANT PROGRAM (HUD GRANT AGREEMENT NO. B-90-SK-MT-0001)

This publication does not necessarily reflect the views or policies of HUD.

Upon request, this publication will be made available in a computer-accessible format.

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A HANDBOOK ON LOCAL LAND USE REGULATION

I. INTRODUCTION

A. BACKGROUND

Modern American people are highly dependent on others in our society. Even in Montana, with its vast space and low population, people are interdependent, and thus a majority of Montanans live closely in large and small cities and towns. These "urban" settings are becoming increasingly complex, and create the need for government rules to ensure the community can function in a safe, pleasant, and rewarding manner. The complexity of communities requires that certain individual rights are limited in order to protect the general welfare. Local government land use management deals with "urban" land use and development, even though those uses may occur in rural areas.

Land use regulation is one of many influences needed to maintain the modern community structure, in which government enforces rules in response to urban needs. The need to impose reasonable limits on land use arises because people, when clustered in communities, demand protections that dispersed people do not need. Subject to a number of statutory and constitutional constraints, land use regulation limits certain personal or private interests in favor of the overall public interest.

In rural states like Montana, agriculture is the largest basic industry and typically is the economic sector that drives the local economy in a vast majority of communities. Agricultural land and open space also constitute the core of our treasured rural lifestyle. Land use planning and regulation can be employed to preserve agricultural land and the economic and social values associated with a rural way of life.

B. PURPOSE OF THE HANDBOOK

In Montana, most local government officials have had limited experience in the complexities of regulating private lands. In addition, there is considerable misunderstanding about the roles of city councils and county commissions, planning boards, planners, zoning commissions, building inspectors, and boards of adjustment. This Handbook is intended to assist these local officials and citizens in understanding the requirements for developing and enforcing land use regulations.

A number of different types of locally administered regulations affect land use: subdivision regulations, floodplain regulations, lake shore regulations, zoning regulations, and development permit regulations. These different types of regulations and non-regulatory land management techniques will be discussed at least briefly in this Handbook. **In this**

Handbook, **however, the term "land use regulations" refers primarily to zoning and development permit regulations, which will be discussed in detail.**
The Handbook offers direction on following proper procedures, and offers guidance on drafting regulatory language that is sound, reasonable, and relates to the public health, safety and welfare. Much of this Handbook contains substantial detail and technical information that is intended to offer in-depth assistance to planners, planning boards, attorneys and others who may become involved in drafting and enforcing land use regulations. The Department of Commerce Community Technical Assistance Program has many other publications and audiovisuals available that elaborate on the concepts presented in this Handbook. In addition, various other publications are available that elaborate on the concepts of related topics such as subdivision regulations, comprehensive plans and capital improvement plans.

> Elected officials should fully understand that adopting land use regulations initiates a long term commitment. Administering and enforcing land use regulations require substantial time, day-to-day administration, and costs – all of which must be part of a political commitment to foster a more pleasant, functional community.

II. WHAT IS LAND USE PLANNING AND REGULATION?

A. GENERAL

Land use planning is the process of determining and influencing the future physical development of the community, county or rural area. Land use regulation is one of several tools that helps implement land use planning by guiding the quality, character and location of future development.

Local government can influence a number of aspects relating to land development with regulatory and non-regulatory measures:

- Quality of Development: Subdivision regulations; zoning; development permit regulations; scenic easements.
- Location of Development: Subdivision regulations; zoning; development permit regulations; floodplain regulations; conservation easements; public services policies.
- Density of Development: Zoning; public services policies.
- Cost of Development: Subdivision regulations; zoning; development permit regulations; fiscal policies.
- Timing of Development: Public services and facilities policies; interim land use regulations.

While a number of tools are available for local government to influence development, regulation is the best known, and the most controversial. But local officials can be effective in shaping development to address community concerns by using non-regulatory measures such as conservation easements or policies relating to financing and public services in conjunction with land use regulations.

The key to deciding what tools to use is to determine what assets and values the community wants to protect and what development problems the community may face. These assets and problems should be identified through a public, comprehensive planning process, and clearly expressed in a comprehensive plan. It is vital that local governments undertake an open, aggressive process to reach, inform, and involve as many residents as possible, and to provide the widest possible opportunity for citizens to offer comments and ideas (see Chapter VII).

It is vital that everyone, especially farmers and ranchers, understand that county governments are generally not allowed to impose regulations on any aspect of farming and ranching operations, nor on logging, raising timber, and mining operations. However, when a farmer or rancher chooses to convert agricultural land to an "urban" use –

residential, commercial and industrial – the use is not agricultural, and is subject to any land use policies or regulations in place. Although regulations can be adopted to protect agriculture from conflicting uses or activities, they cannot regulate agricultural practices such as plowing fields, spraying crops, building barns, corrals or other structures used for agricultural purposes.

> Local government land use management deals with "urban" land uses and development, even when those uses occur in rural areas.

B. LAND USE REGULATIONS: ZONING AND DEVELOPMENT PERMIT REGULATIONS

The two principal categories of land use regulations – traditional zoning and development permit regulations – are briefly explained below. In depth explanations are presented in Chapter V, Deciding What To Regulate; What Type Of Regulation.

1. Traditional Zoning Regulations

Traditional zoning is the legal method by which local governments can divide their jurisdictions into use districts (zones), restrict the uses of land within the various zones, and impose requirements that the permitted uses must meet. As early as the 1800's, city governments in America were preventing slaughterhouses from locating in residential neighborhoods, and requiring spacing between buildings to prevent the spread of fire. These early restrictions on land uses benefitted both the general public and private property owners. Modern zoning regulations still focus on preventing problems by separating incompatible uses, and to achieve a quality and character of development that ensures safe and healthy communities by requiring land uses to meet standards that protect both public and private property owners.

The basic objective of zoning – segregating incompatible uses – is to prevent the adverse or undesirable effects they can have on one another. For example, where homes are located adjacent to an active industrial area, the movement of heavy equipment, noise and dust can affect the safety and tranquility of the residential neighborhood. By the same token, the presence of residents, especially children, can interfere with efficient functioning of industrial activities.

Because zoning regulates the location of various uses, the zoning map, showing the precise boundaries of each use zone, is one essential part of the zoning regulations. The other essential component of the regulations is the text, which specifies the required standards, necessary procedures, circumstances for requesting and deciding appeals, and enforcement and administrative requirements.

Traditional zoning is best applied in urban environments, with high density development, and where segregation of uses is desirable (see subsection 3 below). It is less appropriate in rural areas or small towns with low development pressures, or in unincorporated areas where dictating specific locations may be inappropriate or premature.

2. Development Permit Regulations

Many planners and local officials in Montana have expressed interest in alternatives to traditional zoning as a means to regulate land use. One alternative that can be enacted under existing state enabling statutes is a system called by a number of terms: permit system, performance zoning, performance standards and development standards. In this Handbook the term "development permit regulations" is used to include all of the various land use permit systems.

Development permit regulations usually focus primarily on the character or quality of new development, with less emphasis on regulating the location of development. Development permit regulations often eliminate use districts and set out requirements that apply to new development throughout the jurisdiction. A new use may be issued a permit to locate in most locations, provided it meets the standards and requirements. While the emphasis of development permit regulations typically is on the character and quality of development, the regulations can be drafted to regulate location of new uses, and to apply different requirements in different areas within a county.

Development permit regulations are most suitable for rural, unincorporated areas or small towns with low development pressures, or low densities. In many of these rural areas or small towns, and even in larger urban areas, the community may wish to encourage the mixing of uses to allow more complete and diverse neighborhoods. Development permit regulations are less appropriate in urban environments with high development pressures and high densities – where segregating incompatible uses is desirable.

a. Development Standards

Development permit regulations that simply specify the standards or requirements new development must meet are the easiest type of land use regulation to draft and enforce. Development standards are commonly drafted to regulate:

- Traffic: street widths and grades, street drainage, access points, circulation patterns.
- Off-street parking and loading areas: number of spaces, access, circulation.
- Access by emergency vehicles: street and cul-de-sac widths, road grades and curves.
- Areas unsuitable for development: flood hazard, fire hazard, steep slopes, high ground water, lake and stream shores, wetlands.
- Effects on agriculture: protect irrigation systems, livestock, water supplies.

- Buffering or screening of adjacent uses: height, location, and materials.
- Signs: size, height, location, and materials.
- Setbacks: from streets, lot lines, surface waters.

b. Point Systems

Adopting requirements that outright prohibit or require certain actions may not be feasible, even though the regulations would help achieve a public purpose. The requirements or prohibitions may be too restrictive to meet legal or constitutional tests. In other cases, the requirements may not be politically acceptable to local citizens or the elected officials.

An alternative to regulations that prohibit certain actions is a form of development permit regulations which incorporate a point system that awards points to encourage desirable actions, and assigns negative points to discourage undesirable actions. A development's composite score determines whether or not it receives approval. Point systems can be used to encourage developers to take, or not take, actions that the local government is unwilling or unable to outright mandate or prohibit.

Such point systems often are considered to be more flexible (and thus less restrictive) because a developer may offset a low score on one provision with high scores on other provisions. Because of this flexibility, and the fact that awarding points is very different from traditional zoning, point systems may be more readily accepted in rural areas and small towns. Also, in addition to offsetting low scores, the local government can reward developers for high scores by such incentives as paying part of the cost of constructing certain improvements such as roads or utility lines.

3. Pros and Cons of Separating Incompatible Uses

In recent years, some people have criticized zoning as ineffective, inflexible and cumbersome. In fairness, however, zoning as a land use tool is not at fault. Ineffective regulation results from faulty drafting or weak enforcement of individual zoning ordinances. Lack of explicit development policies, indiscriminate or inconsistent granting of variances, and lack of public support have rendered many zoning regulations ineffective. But the same problems can also affect other types of regulations. The reasons zoning may fail to be effective very likely would be the same reasons development permit regulations or any other type of land use regulation will fail: citizens and local officials are not aware of how zoning can solve specific problems; local officials are not committed to proper enforcement; citizens do not really want effective regulations; or the regulations are unreasonable, enforced unfairly, or do not reflect thoughtful planning or policies.

While the incompatibility of differing land uses may be overcome without segregating the uses, the techniques often are expensive, and the costs may fall on taxpayers. For example, stoplights, crossing guards and chain link fences may be necessary to ensure the safety of school children where a truck route passes an elementary school. Berms,

fences, and landscaping can minimize the impacts where residential and commercial uses adjoin. Separating incompatible uses often may be the most direct and least costly means of protecting school children, maintaining a viable business district or a pleasant and safe residential neighborhood, or assuring a functional and safe industrial area.

On the other hand, blending residential and commercial uses offers a sense of a more unified, diverse, enriched neighborhood. So, while some uses are best separated geographically, many can be mixed, with harmless or even desirable results.

Typically, in larger cities, separating uses through traditional zoning is generally appropriate because more intensive and higher density development can magnify incompatibilities, and zoning often is an easier and less costly means of overcoming conflicts among certain uses. In rural areas, it is often difficult to separate uses and may in fact not be necessary. Whether uses need to be separated depends on the land uses in question, how compatible they are, and the intensity of development within the community.

C. REGULATIONS THAT COMPLEMENT ZONING AND DEVELOPMENT PERMIT REGULATIONS

1. General

The following regulations may be implemented to accomplish specific objectives regarding land use and development. (Note: Subdivision regulations must be adopted and enforced in Montana.) When implemented in conjunction with either zoning or development permit regulations, these regulatory measures can provide local governments with very effective influence over land use.

2. Subdivision Regulations

Subdivision regulations regulate the process of platting land into lots and providing public facilities (e.g., roads, water, sewer, storm drainage) to the lots. The platting and creation of lots is not only the first phase in development, the action sets the permanent land use pattern for the community. Therefore, proper public review of proposed land division is vital to: (1) prevent or minimize impacts on public health and safety and the natural environment, (2) ensure desirable future land use patterns, and (3) allow cost-effective provision of public services, thereby reducing tax expenditures.

In Montana, local government subdivision regulations must evaluate a proposed subdivision's impact on a number of considerations such as the natural environment, wildlife, public health and safety, and local services. The Montana Subdivision and Platting Act (MSPA) (76-3-101 *et seq.*, MCA) requires all counties and municipalities to adopt and enforce subdivision regulations, and to review and decide on development proposals that would divide land into parcels of less than 160 acres, construct one or

more condominiums, or provide multiple spaces for mobile homes or recreational camping vehicles.

A subdivision must be properly surveyed, comply with local design standards, and provide legal and physical access and utility easements. Also, to approve a subdivision, local officials must issue written findings of fact that consider the effect the development would have on agricultural, the natural environment, wildlife and wildlife habitat, local services, and the public health and safety. In addition, local governments that have adopted a comprehensive plan may review a subdivision to ensure that it conforms to the plan.

The Montana Sanitation in Subdivisions Act (MSIS) (76-4-101 *et seq.*, MCA) was enacted to ensure proper sewage and solid waste disposal, water supply, and drainage in subdivisions. Under the MSIS, the Department of Health and Environmental Sciences must approve the sanitation facilities proposed for any subdivision containing lots less than 20 acres in size. Thus, a subdivision with lots of less than 20 acres must generally receive two separate approvals – local approval under the MSPA, and state approval of sanitation facilities under the MSIS.

3. Floodplain Regulations

Floodplain regulations are enforced to prevent loss of life and excessive property damage, protect public health and safety, and reduce public tax expenditures for emergency evacuation and post-flood restoration. In addition to preventing property loss and human injury, floodplain regulations indirectly protect riparian areas and natural stream banks.

Under the Montana Floodplain and Floodplain Management Act (76-5-101 *et seq.*, MCA), any local government, within whose jurisdiction the Montana Department of Natural Resources and Conservation (DNRC) has adopted delineated 100-year floodplains, must administer regulations relating to development in floodplains. Both federal and state agencies have set minimum standards regarding types of development allowed in delineated 100-year floodplains. Delineated 100-year floodplains are those lands bordering a stream that are inundated by a flood event equalled or exceeded, on average, once every 100 years. In any year, there is a one percent chance that a 100-year flood will occur. The DNRC officially delineates 100-year floodplains, using detailed hydrological methods, as well as topographic and historic data.

A floodplain comprises two zones: the "floodway" that carries flood waters of faster velocities, and the "flood fringe" that consists of the flood storage and backwater areas and is subject to low water depths and velocities. In the floodway, prohibited uses include: residential, commercial and industrial structures. Prohibited uses in the floodway and flood fringe include: land fills, septic systems, and storage of toxic, flammable, or explosive materials.

4. Lake Shore Regulations

A specific Montana statute (75-7-201 *et seq.*, MCA) authorizes local governments to adopt lake shore regulations to protect the shore or bank of natural lakes that are 160 acres or more in size. Lake shore regulations apply to any construction or shoreline alteration within the lake shore protection zone – the land within 20 horizontal feet of the mean annual high-water mark. Boat ramps, docks and retaining walls are the most common uses regulated by lake shore regulations. Lake shore regulations also can be adopted under zoning enabling statutes. In fact, zoning or development permit regulations can be more effective in protecting the lake shore zone by regulating development beyond the 20 horizontal feet of the mean annual high-water mark.

5. Streambed Regulations

Under the Montana Natural Streambed and Land Preservation Act, the local conservation districts must issue a permit before a person may physically alter or modify the bed or banks of a stream. The program, known as the "310 Permit Program," is to prevent soil erosion and sedimentation, maintain the integrity of stream channels, protect water quality, and prevent damage to downstream property owners. Basically, a person proposing to alter or modify a stream bed or steam bank is required to design the project to minimize the extent of alteration; minimize stripping of vegetation, minimize cutting, filling and grading; retain natural vegetation wherever possible; reseed, mulch and employ other erosion control measures as soon as possible.

D. TYPES OF NON-REGULATORY MEASURES

1. General

Non-regulatory measures also can be used to influence land use development and to accomplish the community goals and objectives set forth in the comprehensive plan. Also, non-regulatory techniques can augment the effectiveness of regulations in achieving sound land use and development.

2. Capital Improvements Plans

The preparation of a capital improvements plan (CIP) is essential to the community's efforts to identify its needs for new or upgraded public facilities (e.g., water and sewer systems, and roads), and to project the costs and possible funding sources for these facilities. Through the CIP, local officials can set realistic schedules for constructing capital improvements in specific locations. With a carefully drafted plan and schedule in place a local government can impose interim measures such as a moratorium to defer development or limit densities in specific locations until the planned improvements are completed. Cities and towns can use the CIP to schedule the extension of utilities and the annexation of new territory.

3. Local Government Fiscal Policies

City and county fiscal policies can address a number of financial issues, including debt management and transfer of federal and state funds. Those policies dealing with the allocation of costs among taxpayers and service users can influence land development. There are a variety of methods to finance public facilities, and each allocates the costs of the facilities differently. A currently popular concept is that "new growth should pay its way." As a rule of thumb, if a facility serves the community as a whole all citizens, or all taxpayers, should pay the costs. If a facility primarily benefits people in a specific area, those people should pay the costs. Policies for allocating the costs of new or upgraded capital improvements should be part of the overall considerations in locating and scheduling extensions of public facilities.

4. Conservation Easements

Conservation easements are another non-regulatory means of influencing the location of new development. A conservation easement is a voluntary legal agreement a landowner makes to restrict the type and amount of development that may occur on his property. People grant conservation easements to protect their land from inappropriate development while retaining ownership. Such an easement ensures that the resource values will be protected indefinitely, regardless of who the owns the land in the future. The landowner grants an easement to a public agency or to a qualified private tax-exempt organization. If the conservation easement meets federal requirements, property owners can be entitled to reductions in income and estate taxes. Each easement is different, tailored to the specific needs of the landowner, while assuring that conservation objectives are met. Typically, conservation easements prevent or limit subdivision development; construction of residential, commercial and industrial structures; activities which may cause soil erosion or water pollution; mining; and degradation of fish and wildlife habitat. Local governments can work with tax-exempt organizations and property owners to promote and facilitate preservation of productive agricultural lands, or other lands that contribute to the values and assets of the community.

Because the creation of a conservation easement depends on a willing land owner, the usefulness of easements can be limited. However, where land owners are receptive, conservation easements can be very effective in long term preservation of community values such as productive agricultural land or important river corridors.

III. BENEFITS AND LIMITATIONS OF LAND USE REGULATION

A. GENERAL

Land use regulations, developed thoughtfully to reflect citizen concerns, provide definite benefits both to the general public and to private individuals or businesses. There are also legal and practical limits to regulations and what they can do for a community.

To understand the benefits and limitations of land use regulations, they should be viewed in context. As has been explained, regulation is not a single means to deal with all land use issues. The effectiveness of zoning and development permit regulations can be enhanced when they are used in conjunction with other land use tools. For example, zoning and development permit regulations should be coordinated with subdivision regulations, "310" (stream-bed) regulations, and floodplain regulations. Also, these regulations can be used in conjunction with such non-regulatory measures as capital improvements planning and conservation easements.

B. BENEFITS OF LAND USE REGULATION

Thoughtful, reasonable land use regulations can:

- Help hold down costs of extending public services, thus reducing tax or fee increases, and protect the existing investment in these facilities.
- Protect public health and safety.
- Provide safe, convenient, pleasant places to live.
- Provide convenient and functional areas for conducting business.
- Provide functional areas for manufacturing, processing and warehousing.
- Protect residential, commercial and industrial property values.
- Protect agricultural operations from haphazard, unplanned development that can damage water tables, water supplies, and create problems for raising crops and livestock.
- Assist community and economic growth by reserving adequate and desirable sites for residential, commercial and industrial uses.
- Protect fragile lands such as flood prone areas, steep slopes, or unstable soils.
- Ensure sufficient land for, and remove barriers to, affordable housing.

C. WHAT ZONING AND DEVELOPMENT PERMIT REGULATIONS CANNOT DO

A number of factors, legal and practical, limit the use of land use regulations in achieving public benefits. For the most part, land use problems created by past development cannot be corrected through regulations. Where land uses and development legally occurred under the laws and regulations in effect at the time, they have the right to continue, as a "non-conforming" use, even if it does not conform to subsequently adopted regulations. Land use regulations can prevent expansion (or rebuilding after destruction) of pre-existing non-conforming uses, but can require their removal or cessation in only limited situations. **Zoning is primarily protective and preventative, but rarely is remedial.**

However, some non-conforming uses depreciate in value, are relatively inexpensive, and can reasonably be removed. In addition, regulations can require such uses to be removed at the end of a period that reflects the economic life of the structure. For example, non-conforming signs or billboards might be required to be removed within 4 - 5 years (see Appendix A for more detail on amortizing and removing certain non-conforming uses).

As previously indicated, county land use regulations may not regulate farming and ranching, growing or harvesting timber, or mining (however, mining may be regulated by county planning and zoning districts, [76-2-101 through 76-2-112, MCA]). Both the Local Planning Enabling Act (76-1-101 *et seq.*, MCA) and the County Zoning Enabling Act (76-2-201 through 76-2-228, MCA) prohibit planning for, and regulating, those activities.

Because land use regulations and zoning district boundaries may be changed, residents have no guarantee that existing land use protections will always be in place. This perceived problem is often counterbalanced by the positive feature of flexibility, which allows regulations to be updated to meet changing circumstances.

D. LINKING ZONING AND DEVELOPMENT PERMIT REGULATIONS WITH THE COMPREHENSIVE PLAN AND OTHER MEASURES

1. Relationship of Land Use Regulations to the Comprehensive Plan

The comprehensive plan is a non-binding document that is developed through a public process that identifies land use issues and gives direction for dealing with those issues. Regulations, in contrast, carry out the direction and policy of the plan by articulating in specific language requirements that govern the use of land.

Montana law requires that zoning and development permit regulations conform to an adopted plan. In the case of *Little v. Board of County Commissioners of Flathead County, 38 St. Rptr. 1124, 631 P.2d 1282 (Mont. 1981),* the Montana Supreme Court ruled that land use regulations must closely conform to the comprehensive plan. In fact, before amendments to a zoning ordinance may be made, the plan may have to be amended to ensure that the zoning amendments will conform. The purpose of this requirement is to ensure that land use regulations are drafted and enforced in the context of a broad, carefully considered, public purpose. The plan is the public's expression of a planning vision for the community. Regulations adopted in conformance with a plan are less likely to be arbitrary than those adopted in isolation.

2. Relationship of Zoning and Development Permit Regulations to Other Measures

As mentioned, zoning and development permit regulations are not the only means for addressing land use issues. A number of other regulations and non-regulatory measures may be used to influence land use and development. Scheduling and financing the construction of water and sewer extensions, streets, and other public facilities can influence the location and timing of new development. Conservation easements can be used to prevent intrusion of development into productive agricultural land. Local government has the ability to use a variety of regulations such as subdivision, floodplain, or lake shore regulations to complement zoning or development permit regulations.

Subdivision regulations govern the division of land, creation of building sites and provision of public services, but they do not control land uses nor the location, size and type of structures. Therefore, to effectively influence the entire range of activities that constitute the conversion of raw land into completed land development, local officials need to complement their subdivision regulations by enforcing carefully drafted zoning or development permit regulations. Because floodplain regulations only govern uses within a delineated 100-year floodplain, zoning or development permit regulations should be adopted in conjunction with floodplain regulations both to ensure proper development and to protect the stream corridor from impacts created beyond the floodplain. Likewise lake shore regulations, governing only an area within 20 horizontal feet from the mean annual high water mark of a lake, should be coordinated with carefully drafted zoning or development permit regulations that operate throughout the municipal or county jurisdiction.

Effectively linking and coordinating the various land use tools requires a comprehensive planning process that (1) clearly identifies community objectives, and (2) determines exactly how each of the available tools can be used in coordination with one another to achieve those community objectives.

Local government influence over development within the community is most effective when all the tools are thoughtfully linked together as a unified package to achieve community objectives. Zoning and development permit regulations can be linked with the enforcement of building permits, subdivision regulations, "310" stream bank permits, and floodplain permits, and with the use of conservation easements and capital improvements planning and scheduling. A well-drafted comprehensive plan is the most effective means of coordinating these various tools.

E. COMMITMENT TO IMPLEMENTING ZONING AND DEVELOPMENT PERMIT REGULATIONS

Local officials should understand that adopting and enforcing land use regulations will be a long term commitment – a commitment involving time, money and political support. To capitalize on the effort needed to adopt land use regulations, local officials will want to maintain the purpose and integrity of the regulations through effective enforcement. Effective enforcement usually requires a committed administrative officer and dedicated members of the permitting board and the board of adjustment.

To maintain the sustained commitment of the administrative officer, a reasonable level of compensation is usually necessary. The cost of administering and enforcing land use regulations can be met, or partially met, by charging review fees to applicants for permits. Although review fees probably will be acceptable to most local citizens, governing officials still may face opposition from developers and some land owners.

In addition to the commitment to pay reasonable costs for administering and enforcing land use regulations, governing officials should be committed to politically supporting their administrative officer, zoning commission, planning board, board of adjustment and any other personnel in their efforts at proper and sound enforcement. Effectively enforcing regulations can generate opposition, and the officials facing such opposition need the support of the governing body.

A third aspect of the long term commitment is that the regulations and their enforcement should be examined periodically to ensure that (1) the purpose and integrity of the comprehensive plan and land use regulations are being carried out, and (2) any needed revisions are made when necessary to keep the regulations up-to-date, maintain compliance with the plan, and foster smooth and effective administration.

IV. LEGAL FRAMEWORK FOR ZONING AND DEVELOPMENT PERMIT REGULATIONS

A. GENERAL

The statutes described below authorize the adoption of zoning or development permit regulations. Because municipal and county land use regulations must conform to an adopted comprehensive plan, it is important to remember that the Local Planning Enabling Act (76-1-101 through 76-1- 606, MCA) is the essential legal authority that provides for initiating a process of comprehensive planning and adopting regulations.

As a preface to the following discussion of the statutes authorizing land use regulations, it is important to note that the Montana Supreme Court has upheld the constitutionality of the Municipal Zoning Act and the County Planning and Zoning District Act as valid delegation of power to cities and counties. The constitutionality of county zoning has not been challenged to date.

The Montana Supreme Court has also ruled (*Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750, 1983*) that to be valid a zoning ordinance must provide an appeals mechanism to prevent injustices resulting from strict enforcement of regulations. The court stated that both the community and individual property owners benefit by assuring that property is capable of being used and not forced to lie idle because it is zoned in a way that prohibits any practical use. The County Zoning Enabling Act requires that the county commissioners establish a board of adjustment to serve this appellate function. The Municipal Zoning Enabling Act authorizes establishment of a board of adjustment, but also allows the municipal governing body to serve all or a portion of the appellate role if it chooses.

B. MUNICIPAL ZONING ENABLING ACT (76-2-301 through 76-2-328, MCA)

The Municipal Zoning Enabling Act authorizes incorporated cities and towns to adopt zoning or development permit regulations to regulate the size, height and location of buildings and other structures on lots, regulate densities, and divide the municipality into zoning districts to regulate the location of various uses. Key provisions of the act include:

- Regulations must conform to comprehensive plan. The municipality must have adopted a comprehensive plan, and the land use regulations must conform to the plan.
- Zoning Commission required. To develop and enact land use regulation, the city must create a zoning commission, which must develop proposals regarding boundaries and requirements, prepare a report, hold hearings, and submit recommendations to the governing body.

- Interim regulations authorized. Municipalities that do not have an adopted comprehensive plan are authorized to adopt interim zoning regulations to govern

land use while a comprehensive plan is being prepared and adopted (see subsection E. below for more detail).

- Extraterritorial regulations authorized. Cities and towns are authorized to extend municipal zoning regulations beyond their corporate boundaries, if they have adopted a comprehensive plan that includes the territory to be zoned. A municipality may not adopt extraterritorial zoning for an area that has been zoned by the county. A first-class city may extend extraterritorial zoning up to 3 miles beyond its corporate boundaries; a second-class city up to 2 miles beyond, and a town or third-class city up to 1 mile beyond its corporate boundaries.

- Board of Adjustment authorized. The Municipal Zoning Enabling Act authorizes cities and towns to establish a board of adjustment to handle appeals for variances, special exceptions, and appeals from zoning decisions. The governing body may define and limit the powers of the board of adjustment. Most municipal zoning ordinances establish a board of adjustment to serve the appellate function.

C. COUNTY ZONING ENABLING ACT (76-2-201 through 76-2-228, MCA)

The County Zoning Enabling Act authorizes counties to adopt zoning or development permit regulations for all or part of the county. The county may create zoning districts to control the location of various uses within the jurisdiction, regulate buildings and other structures, and provide a process to issue permits. Key provisions of the act include:

- Conformance with comprehensive plan. To adopt zoning regulations, the county must have an adopted comprehensive plan covering the entire jurisdiction of the planning board (Montana Supreme Court, *Martz v. Butte-Silver Bow Government, 196 Mont. 348, 641 P.2d 426, 1982),* and the zoning regulations must conform to the plan.

- Planning board must recommend regulations. The county commissioners are required to direct the planning board having jurisdiction over the area proposed to be zoned to develop recommended regulations (county commissioners may appoint a zoning commission as an alternative to using a planning board).

- Forty percent written protest prevents adoption. The County Zoning Act provides that if 40 percent of the real property owners within a territory proposed to be zoned submit a written protest against the proposed regulations during a 30-day protest period, the county may not proceed with adoption for at least one year.

- Agricultural, forestry and mining production may not be regulated. The act specifically prohibits the county from adopting regulations that would prevent the complete use, development or recovery of agricultural, mining or timber products. (See further explanation on pages 3 and 4).

- Board of Adjustment required. The county commissioners are required to provide a board of adjustment as part of zoning regulations to hear and decide on applications for variances, special exceptions, and appeals from zoning decisions.

D. COUNTY PLANNING AND ZONING DISTRICTS (76-2-101 through 76-2-112, MCA)

When petitioned by 60 percent of the real property owners within an area 40 acres or larger, the county commissioners are authorized to create a planning and zoning district and adopt land use regulations for the district. Land use regulations may be adopted under this statute whether or not the county has an adopted comprehensive plan. Upon receipt of a proper petition, the county commissioners hold a public hearing and decide whether to form a planning and zoning district and where the district boundaries should be located. Key provisions include:

- Planning and zoning commission required. Upon creating the district, the county commissioners are required to appoint a planning and zoning commission, which must comprise the three county commissioners, the county surveyor and the county assessor.

- Development plan to be prepared. The planning and zoning commission must prepare a development plan, which is a document that may use maps to show desirable or undesirable locations for future land uses, and may express statements of issues, goals, objectives and policies relating to the district. The planning and zoning commission then drafts recommended land use regulations. The county commissioners are empowered to revise the recommendations made by the planning and zoning commission and adopt the final regulations. Where a county has an adopted comprehensive plan, the county commissioners may want the district regulations to reflect the county comprehensive plan.

- Appeals procedures. The act authorizes the county commissioners to grant variances from the regulations. Also, any person who is aggrieved by a decision of the planning and zoning commission or the county commissioners may appeal to district court.

- Agricultural and forestry production may not be regulated. Regulations under this act may not regulate lands used for agriculture, grazing, horticulture or growing of timber. (See further explanation on pages 3 and 4).

E. INTERIM LAND USE REGULATIONS

Both the municipal and county zoning enabling acts specifically authorize governing bodies to adopt interim land use regulations. The purpose of these interim regulations

is to protect community values, or to prohibit uses that might be in conflict with regulations contemplated by the community, during the preparation and adoption of a comprehensive plan and land use regulations.

In addition to protecting community values and preventing potentially conflicting uses, one feature of interim regulations is that they give local government more latitude to prohibit certain uses. Enforcing a moratorium on building or development can be justified not only to protect community values during adoption of a plan and regulations, but also because such restrictions will be enforced only temporarily.

Cities and towns may adopt interim regulations for a 6-month period, and with a public hearing and two-thirds vote of the council, may extend the regulations for two one-year periods. Counties may adopt interim regulations for one year, and are allowed to extend the period for one additional year. The Montana Supreme Court has held that in adopting interim zoning, counties must provide for a hearing on the issue.

The County Planning and Zoning District statute does not specifically authorize interim regulations, but if the planning and zoning commission and county commissioners followed all the procedures specified in the act interim regulations could be adopted. Because a comprehensive plan is not a prerequisite for adopting land use regulations for a planning and zoning district, the advantage of adopting interim regulations still would be to prevent uses that might conflict with eventual plans and regulations during the time needed to prepare a thorough development plan with regulations that are drafted with care and deliberation.

F. CONSTITUTIONAL VALIDITY OF LAND USE REGULATIONS

Zoning and development permit regulations must meet four constitutional tests of validity:

1. Substantive Due Process: The regulations must:
   a. be reasonable – go no further than is required to achieve a legitimate government objective, and
   b. substantially relate to, and further, the public health, safety, and general welfare.

2. Procedural Due Process: The regulations must comply with the procedural requirements of the applicable enabling statute, and as a minimum:
   a. conform to an adopted comprehensive plan.
   b. provide appropriate notice of hearing.
   c. provide a full and open hearing with opportunities for all parties to be heard;
   d. ensure maintenance of an adequate record.
   e. ensure a decision in writing with a finding of fact.

3. Equal Protection: The regulations and their enforcement must not:
   a. be arbitrary or capricious in the treatment of individual persons and property or

discriminate between similar properties (spot zoning or non-compliance with the comprehensive plan are examples of denial of equal protection).

b. be exclusionary – have the effect of excluding racial, minority or economic groups from the jurisdiction.

4. Taking: The regulation must not constitute an unconstitutional "taking" of property. The most commonly applied "taking" test is whether the regulation denies a property owner all economically viable use of his or her property.

G. LAND USE REGULATIONS AND LITIGATION

The possibility always exists that a local land use regulation such as a zoning ordinance, or more probably some section of it, will at some future date be the subject of litigation. Thus the drafting of any regulation needs to take into consideration such a possibility. It is impossible to foresee all the possible legal interpretations that courts may place on a land use regulation. A well-drafted ordinance, of course, is less likely to be litigated than one poorly drawn. Clear and precise language will avoid legal pitfalls in most instances. The purpose of good land use law and administration is to avoid litigation, not to encourage it. Proper procedures, including the careful and complete maintenance of required records pertaining to the administration of an ordinance, will greatly diminish the possible areas of litigation.

As an example, zoning regulations have at times been found invalid because such regulations were "arbitrary, capricious, and unreasonable." **Any land use regulation must meet the test of reasonableness. There must be a reason for each zoning regulation, and that reason must bear a sound and defensible relationship to the public health, safety, and welfare. Land use regulations must be based on and directly related to valid public interest.**

> Land use regulations have seldom been challenged in Montana based on legal or constitutional grounds. Local political constraints in adopting or modifying regulations are usually more limiting than constitutional constraints.

V. DECIDING WHAT TO REGULATE; WHAT TYPE OF REGULATION

A. GENERAL

Comprehensive planning is a vital prerequisite in determining what land use measures should be used and how to link and coordinate the appropriate measures. In addition, comprehensive planning is an essential step in determining what a community wants to regulate, and what type of regulation is most appropriate.

Local officials should not initiate the process of drafting land use regulations by simply assigning the task to an attorney or consultant. These decisions should be based on community values, perceived problems and issues, and local opinion on what to regulate and how restrictive to be. Citizens should make these decisions in a systematic and deliberative manner. After developing a framework for the desired regulations, an experienced land use attorney or consultant should work with the citizens, planning board and governing officials to ensure that the regulations are legally sound and carefully drafted.

As part of an open, public planning process, citizens and local officials should take the following steps:

- Identify the local values and assets to be protected or enhanced.
- Identify potential or existing problems.
- Identify the public need or benefit (stress public health and safety).
- Rephrase identified problems as statements of benefit or objectives.
- Develop clear goals that relate to identified problems, issues and public need.
- From clear goals, develop explicit policies; from explicit policies, develop regulations. Regulations are tied to explicit policies; policies are tied to clear goals.

B. OBJECTIVES OF LAND USE REGULATIONS

The following are general objectives that residential, commercial, industrial and rural area development should meet, and the conditions that land use regulations should foster:

Residential development regulations should promote safe, convenient, pleasant places to live by:

- minimizing traffic congestion and hazards.
- minimizing noise, dust, smoke, odor, or fire danger.
- ensuring adequate light and air (promotes public health).
- ensuring adequate access for utilities, city services, and emergency vehicles.

Commercial development regulations should promote a convenient and functional area for conducting business by:

- providing adequate parking for customers and employees.
- facilitating smooth traffic flow with minimal congestion or hazards.
- facilitating convenient freight service to businesses.
- providing convenient and attractive shopping areas for consumers.
- facilitating landscaping and aesthetic design.

Industrial development regulations should promote functional areas for manufacturing, processing, and warehousing by:

- ensuring adequate freight (truck and rail) service.
- ensuring adequate space for industrial activities.
- minimizing interference with moving and operating vehicles, equipment, and machinery (caused by residential or commercial vehicle traffic, pedestrians, children).
- preventing health or safety hazards by requiring fencing or other measures to protect the public and adjacent properties.
- ensuring adequate roads and utility service.
- facilitating landscaping and sound design.

Regulations in rural areas should protect agricultural operations, open space and rural character, and minimize public cost of providing services by:

- encouraging development in or near existing communities and public services.
- preventing interference with irrigation systems.
- protecting key assets: stream or lake; productive agricultural land; special views.
- discouraging remote, scattered development that requires costly services and displaces productive agricultural land.

Examples of Regulations and Their Benefits

Regulation of:	Benefits:
1. Lot size	a. provides adequate space, light, air, privacy b. reduce fire hazard, congestion c. limit densities (protect water and sewer system cities)
2. Yard widths	a. provides adequate space, light, air b. access for utilities, emergency vehicles c. reduce traffic and fire hazard, noise, dust, fumes d. sight clearance for drivers

	e. in commercial and industrial areas: provide for parking and traffic movement
3. Height limits	a. provides adequate space, light, and air b. facilitate fire fighting c. protect attractive views
4. Off-street parking	a. reduce traffic congestion b. increase shopper convenience
5. Loading areas	a. reduce traffic congestion b. increase customer and worker safety
6. Signs	a. increase traffic safety b. protect residential and commercial areas c. reduce nuisances d. provide advertising for businesses
7. Fences	a. provide sight clearance
8. Berms	a. reduce noise b. provide barriers for unwanted intrusion (traffic, pedestrians)
9. Home Occupations	a. reduce parking and traffic congestion b. reduce noise, smoke, fumes, odors
10. Flood prone areas	a. reduce property damage b. prevent expansion of flooded area c. protect lives
11. Landscaping	a. reduce noise b. reduce air pollution c. reduce building heating, cooling costs d. aesthetic benefits e. increase property values

C. REGULATIONS TO PROTECT OR ENHANCE SPECIAL VALUES

Citizens in many communities want to protect or enhance certain values or assets that they perceive to be very important, such as productive agricultural land, river corridors, or historic areas. Regulating land use and development with the purpose of protecting such community values has a much shorter history than regulating for more conventional land use concerns associated with residential, commercial and industrial uses. Therefore,

planners and local officials should proceed with caution. Three factors that are crucial when drafting any land use regulations are even more important when formulating regulations to protect or enhance special community values:

1. Strong citizen support is necessary. Because regulations that address special values can have far-reaching implications for property owners and others, it is vital to have strong support from the citizenry. Obtaining local public support often requires that proponents of land use measures undertake a concerted public awareness or education effort to explain why the identified special values are important to the community.

The comprehensive plan should express the fact that citizens support protecting the community value in question. Results of community opinion surveys, comments at public meetings, and comments emerging from focus groups all help establish the fact that the community appreciates the significance of the community value, and supports its protection or enhancement.

2. The comprehensive plan should identify and articulate the fact that the community value(s) are indeed real, and constitute a genuine benefit to the community. Whether the benefit to the community is economic, social, cultural or environmental, the worth and benefit should be expressed and quantified as specifically as possible (Appendix D explains in detail how community benefits of certain values can be determined and expressed).

3. The proposed regulatory language should be carefully drafted to ensure the highest probability of meeting the constitutional tests: 1) ensuring substantive due process, 2) providing procedural due process, 3) ensuring equal protection, and 4) avoid a "taking." It should also employ the least restrictive means necessary to obtain its objective.

A fourth factor that may not be essential, but could enhance the effectiveness of the regulations, is to link, whenever possible, the land use regulations to other regulations, non-regulatory measures, and incentives.

D. CHOOSING THE TYPE OF LAND USE REGULATION

Having determined the specific objectives of local land use regulations, and the factors that should be regulated, local officials and citizens face the question of whether or not separating uses is appropriate for their particular community. Segregating various land uses through traditional zoning often has real benefits and can be the most easily administered approach. This approach is usually the most direct and least costly way of protecting school children, maintaining a viable business district or fostering a functional industrial area.

Segregating land uses can avoid conflicts that typically arise between heavy traffic and pedestrians, or between residences and industrial activities. By prohibiting inharmonious

uses, such as heavy industry or single-family residences, communities can facilitate a strong, convenient core commercial or downtown district. The area can emphasize commerce and shopping and still accommodate rental and multi-family residential uses. Affordable housing can also be permitted in these commercial areas to allow senior citizens and others to walk safely and conveniently to stores and services.

Industrial areas that are served by trucks and heavy equipment, or that may generate noise, dust, or bright light, function most efficiently when they are separated from residential areas. Children, pets, residential traffic, and playgrounds, all associated with residential neighborhoods, can easily interfere with the safe functioning and activities of manufacturing and processing and the railroads and freight vehicles that serve those uses. Chain link fences, buffers, screens, properly designed access and parking all help minimize these incompatibilities, but geographic separation can be more effective and less costly.

Commercial uses that primarily serve customers in vehicles, such as motels, automobile dealerships, repair shops and parts stores can function more efficiently when located away from uses oriented to pedestrians, shopping and children playing. When these uses are separated from pedestrian activities they can more readily provide adequate off-street parking, safe access points onto highways, and sign regulations that optimize traffic safety, reduce congestion, and improve customer convenience.

On the other hand, in many communities, especially small towns with low populations, densities and intensities of development, conflicts among land uses are usually few and there is less need to segregate uses through zoning. In unincorporated and rural areas, not only does the low density of development often make segregating uses unnecessary, but local officials often find that it is difficult to determine proper locations of various uses in undeveloped territory. In these circumstances, the focus of land use regulations should be on promoting safe, compatible development, regardless of where it is located.

Local officials in Montana have almost complete discretion to draft and adopt land use regulations that fit their community. Legal constraints on the substance of local land use regulations are minimal: (1) regulations must provide an appeals process such as a board of adjustment, (2) regulations may not regulate agricultural or timber (and under several statutes, mining) production, (3) regulations must meet four "tests" of constitutional validity (see page 18). Except for these statutory and judicial requirements, a governing body is free to develop a comprehensive plan and conforming zoning and development regulations that the community feels best meet its land use concerns and needs.

E. DRAFTING TRADITIONAL ZONING REGULATIONS

One of the first considerations in drafting zoning regulations will be to determine the number of different types of use districts that are appropriate for the community. The number will depend on the types of activities the community wants to keep segregated. Smaller communities with less intensive development usually face fewer land use conflicts, while larger cities with more people, and more intensive development usually face many diverse conflicts among various land uses. Generally, zoning regulations with fewer districts are easier to administer than regulations with numerous districts.

A zoning regulation should only include restrictions that deal with real problems facing the community. For example, a small community may not see a need to include in its zoning ordinance a limitation on the percentage of the lot covered by buildings. Omitting such a requirement might make the zoning regulation easier to administer.

Planners, local officials, and citizens should try to visualize the type of neighborhood or area they are trying to achieve or protect, and how each proposed requirement will affect the future development within the district. In both large and small communities, zoning can allow a mix or blending of residential and commercial uses that often form unified neighborhoods. Grocery stores, hardware stores, drug stores and beauty salons are examples of stores and services that serve residential neighborhoods. They can be valuable and appropriate additions to a residential area.

Convenience stores are becoming more and more common, and often replace the traditional corner grocery store. Convenience stores are usually located along main streets, or arterials to take advantage of the market potential represented by passing motorists. These stores, which usually sell gasoline, also can be useful services for the residents living in the area, and carefully drafted requirements can ensure that convenience stores are compatible with the surrounding residential environment.

> One vital but frequently overlooked step in developing zoning regulations, is to draft a thoughtful, explicit purpose statement for each district. This statement should articulate what public benefits the district is to achieve and what characteristics the permitted uses are expected to possess. A carefully and thoughtfully drafted purpose statement will help local officials, and citizens better understand what uses should be permitted and excluded, and what requirements the permitted uses should meet (See Appendix F for examples).

F. DRAFTING DEVELOPMENT PERMIT REGULATIONS

When a county or community has determined that ensuring good quality development is of greater importance than separating land uses, a form of development permit regulation as opposed to traditional zoning is appropriate. Although the emphasis of most development permit regulations is on the character and quality of development, the regulations can be drafted to regulate locations of new uses. For example, development permit regulations can prohibit development in critical areas such as wetlands, steep erodible slopes, or adjacent to stream banks. Similarly, development permit regulations can prohibit commercial or industrial uses from locating in an undeveloped river valley.

Under development permit regulations different requirements can apply to different areas within a county. Development permit regulations can contain more specific requirements to manage development in a growing unincorporated community but with less restrictive or specific standards to govern development in the rest of the county.

Because development permit regulations implement development policy, the comprehensive plan should be written so that a logical rationale flows from statements of planning issues, through statements of goals and objectives to statements of development policy. If clear goals and explicit polices have been adopted, appropriate regulations should be easier to identify and draft. Where possible, the comprehensive plan should be developed with a view toward drafting development permit regulations. Also, the attitudes of citizens and governing officials and their identified land use problems will be important in suggesting what types of regulations and what degree of restriction is appropriate in each jurisdiction.

There are several types of development permit regulations, and a community may incorporate provisions from two or more of the several types into a single set of land use regulations. Understanding each of the different types and their effects should help planners, local officials and citizens select the requirements that might best meet the intended purpose of the land use plan, policies and regulations. The various types of development permit regulations are grouped into four categories and described on the following pages. Local officials can select the type of regulation based on the desired degree of restrictiveness and the local technical and administrative capacities.

1. Development Standards

Development permit regulations that simply state the standards or requirements new development must meet are the easiest form of land use regulation to draft and enforce. Development standards can be classified into three categories, briefly explained below.

a. Design Standards

Design standards are specific, often quantified, standards that regulate the design and

location of new development. Requirements for set backs, maximum building heights, minimum lot size, and maximum street grades are examples of design standards. They are straightforward, usually objective, and easy to administer. When design standards are thoughtfully drafted they foster a desired level of performance but with easily administered standards, rather than elaborate or technical measurements or predictions (see discussion of performance standards below). One potential drawback of design standards is that they are usually not flexible. Deviations from the standards are usually allowed only through the granting of variances, special exceptions or conditional use permits.

b. Performance Standards

Performance standards are tailored to regulate the effects of a development rather than its design. Through performance standards local officials can require certain minimum standards for air, water and soil quality, noise, dust and smoke emissions, or traffic safety. The advantage of performance standards is their flexibility, which affords developers wide latitude in designing developments which meet the expected level of performance while imposing few absolute design standards. The two primary drawbacks of this technique are (1) measuring performance can be complicated or technical, especially for air, water and soil quality, or for noise levels; and (2) predicting the effects of performance can be difficult, such as traffic safety, or storm runoff.

c. Land Capability Standards

Land capability requirements are based on the capability and suitability of the physical environment to accommodate development. A typical example is the sizing of a septic drainfield according to the site's soil percolation capacity. Also, steeper slopes or highly erodible soils on a particular site may necessitate that development density be limited. Land capability standards can allow flexibility in design provided that the proposed development is compatible with, and suitable for the physical features of the site. Administering land capability standards requires technical expertise in resource data and interpretation, and a thorough understanding of how development effects land and natural resources.

If the comprehensive plan expresses clear and explicit policy statements, drafting specific regulatory language as development standards that implement the policies should be fairly easy. Development standards are commonly drafted to regulate:

- Traffic: street widths and grades, street drainage, access points, circulation networks.
- Off-street parking and loading areas: number of spaces, access, circulation.
- Access by emergency vehicles: street and cul-de-sac widths, road grades and curves.
- Development in unsuitable areas: flood hazard, fire hazard, steep slopes, high ground water, lake and stream shores, wetlands.

- Effects on agriculture: protect irrigation systems, livestock, water supplies.
- Buffering or screening of adjacent uses: height, location, and materials.
- Signs: size, height, location, and materials.
- Setbacks: from streets, lot lines, surface waters.

2. Point Systems

This type of development permit regulation allocates awards or deducts points based on the proposed development's degree of compliance with each particular requirement. Approval of the development is based on the total or composite numerical score. A point system usually operates in conjunction with conventional development standards. Point systems are difficult to draft because of the necessity to establish a proper relationship between the point values and the relative importance of each requirement, and to create a proper balance among the various point values. Unless a development permit system is carefully formulated with explicit and clearly understood requirements, using points can be difficult to administer because the judgement required in assigning points to an individual development proposal is too subjective. In reality, point systems usually do not achieve better land use design or development than the simpler system based on straightforward development standards, with one the exception explained below.

Adopting requirements that outright prohibit or mandate certain actions may not be feasible or appropriate, even though the regulations would help achieve a legitimate public purpose. This may be the case where the requirements or prohibitions are too restrictive to withstand a legal challenge. In other cases, the requirements may not be politically acceptable to local citizens or the elected officials. A community can incorporate a point system that awards points to encourage desirable actions, and deducts points to discourage undesirable actions. For example, a community might be unwilling to prohibit development in critical big game winter range, but the likelihood of losing points under the development permit system if he pursues such a development might persuade a developer to find a more suitable location. By assigning positive points to a development which will be located near existing services, the point system encourages developers to locate near an existing community where services are less expensive and tends to preserve productive agricultural land.

In addition to awarding or deducting points, local officials can include economic incentives in a permit system to encourage certain types or locations of development. For example, a county may offer to pay part of the costs of extending a road or providing assistance for constructing affordable housing through a federal, state or local housing program. Incentives can be incorporated into any version of development permit regulations, not just those with point systems.

Regulations incorporating point systems often are more attractive to citizens than those using only development standards. Point systems often are considered to be more flexible (and thus less restrictive) because a developer may offset a low score on one

provision with high scores on other provisions. Because of this flexibility, and the fact that awarding points is very different from traditional zoning, point systems may be more readily accepted in rural areas and small towns.

Point systems are more difficult to draft because of the necessity to establish a proper relationship between point values and the relative importance of each provision, and to create a proper balance among the various point values. Point systems also are much more difficult to explain to citizens, developers, and other interested people.

The logical use of a point system is to urge developers to take, or not take, actions that the local government is unwilling or unable to outright mandate. The following are actions that are desirable or undesirable, but seldom can be required or prohibited outright:

Encourage:

- Development in preferred locations:
  - near existing services
  - in or adjacent to communities
  - less productive lands
- Cluster development
- Underground utilities
- Affordable housing
- Landscaping
- Appropriate architecture (e.g., compatible with adjacent development
- Energy conservation

Discourage:

- Development in undesirable locations
  - agricultural land
  - wildlife areas
  - sensitive areas
- Strip commercial development

The following example shows how a point system might be used to foster construction of affordable housing units:

Provision of Affordable Housing

Percentage Affordable Housing Units of Total Units:

1. 0% affordable housing units	−10
2. 1−10% affordable housing units	+ 4
3. 11−20% affordable housing units	+ 6
4. 21−30% affordable housing units	+ 8
5. 30+% affordable housing units	+10

CHARACTERISTICS OF TYPES OF DEVELOPMENT PERMIT REGULATIONS

Type of Development Regulation	Description	Characteristics
Design Standards	Specific or quantified standards governing design of new development. Example: Residences shall have front yards at least 25 feet in depth.	▪ Easy to administer. ▪ Less complicated. ▪ Precise but less flexible. ▪ Requirements most closely resemble those in zoning regulations.
Land Capability	Character and intensity of development are based on capability and suitability of natural environment. Example: Where both water supply and sewage disposal will be provided on-site, and soils are rated a severe limitation, minimum lot size shall be 80,000 square feet.	▪ Requires in-depth resource data, technical interpretation. ▪ Requires thorough knowledge of development impacts on land and natural resources. ▪ Allows flexibility in design.
Performance Standards	The effects of a development, rather than the design, are regulated. Example: Commercial uses likely to generate more than 100 vehicle trips per day shall be allowed only if directly served by an arterial or collector street.	▪ Allows design flexibility. ▪ Difficult to draft and administer because of need to predict effects of proposed development. ▪ Administrators and developers may not have access to easily available mitigation strategies.
Point System	Points awarded based on degree of compliance with each requirement. Approval is based on a composite score. Example: Location of Proposed Development: On "prime" ag land..... -10 0-1/2 mile from city..... 0 1/2-5 miles from city.... - 4 5-10 miles from city..... - 6 Beyond 10 miles from city. - 8	▪ Allows design flexibility. ▪ Complicated to draft. ▪ Can encourage or discourage. measures that cannot be required or prohibited outright.

G. REGULATING SPECIFIC USES

1. Regulating Mobile Homes (Manufactured Housing)

Many people in Montana view mobile homes as a negative feature within the community. These people claim that mobile homes are unattractive, are readily subject to deterioration, depreciate in value, usually are associated with high density development, can be fire hazards, are taxed at low rates, and are often occupied by renters that have less concern for appearance or a sense of neighborhood. As a result, these people maintain that mobile homes diminish market values of nearby properties and the pleasantness of the neighborhood (or even the community). In fact, one of the motivations to initiate land use regulations is to prohibit, or at least regulate, mobile homes.

The history of mobile home construction, housing development and taxation bears out some of this criticism of mobile homes. Fortunately, some of the problems are being overcome by modern construction techniques, materials and design used by mobile home manufacturers, replacement of older mobile homes with modern units, and changing attitudes by developers, local officials and citizens.

Because a variety of housing types are constructed off-site in manufacturing facilities, it is reasonable to define, and distinguish among, the various types of factory-constructed housing. First, "modular" housing is constructed in accordance with the standards specified in the Uniform Building Code and the Montana building, plumbing, electrical and mechanical construction codes that site-built housing must meet.

The factory-constructed housing called "mobile homes" by most people is officially designated by the U.S. Department of Housing and Urban Development (HUD) as "manufactured housing" if built after July 1, 1976. Manufactured housing meets a construction standard enacted by HUD under 42 USC Section 5401 (National manufactured Home Construction and Safety Standards Act), called the "HUD Code." Mobile homes built prior to 1976 were not required to meet a federal standard, although many were built to a voluntary industry standard.

Most citizens assume that the term "manufactured housing" refers to modular housing. To minimize this confusion local officials may want to continue to use the commonly accepted term "mobile home" in comprehensive plans and land use regulations. Where local officials use the term "mobile home" in a land use regulation, it is crucial that the regulation clearly define a post-1976 mobile home as one that meets the HUD Code of 42 USC Sec. 5401. To be consistent with the official HUD definition, local officials may wish to draft land use regulations using "manufactured home" to refer to post-1976 units.

Some land use regulations further segregate manufactured homes into two categories. "Class A" manufactured homes not only meet the HUD Code but also meet certain additional criteria that make the unit's appearance similar to that of conventional housing.

Examples of these criteria include:

a. The home has a length that does not exceed four times its width;
b. The pitch of the roof has at least a vertical rise of 1 foot for each 5 feet of horizontal run, and the roof is finished with a type of shingle that is commonly used in conventional housing;
c. The exterior siding consists of wood, hardboard, or similar materials comparable in composition, appearance and durability to siding commonly used in conventional housing;
d. The home is placed on a permanent masonry foundation;
e. The tongue, axles, transporting lights, and removable towing apparatus are removed after placement on the lot and before occupancy.

"Class B" manufactured homes, in contrast, are built to the HUD Code, but do not meet the additional criteria specific for Class A units. The ordinances make these distinctions because Class A manufactured homes are allowed in the same residential zones as site-built homes, whereas Class B units are restricted to only those zones that specifically allow manufactured homes.

Manufactured homes have been a means to provide immediate lower-cost housing for a rising percentage of low and moderate income households. Bringing affordable multi-family housing on-line usually takes time, and in many growth areas in Montana today, building affordable conventional housing almost is impossible without subsidies because of the strong market for higher cost housing. Manufactured housing has dominated the $60,000-and-under housing market. Because of the realities of depreciating value and the tendency for deterioration, manufactured homes may not be the best long term solution for a low income family's housing needs, but they represent one of the few realistic answers to providing affordable housing to low- or moderate-income families in a timely manner.

Because manufactured homes have been an essential means of providing affordable low and moderate income housing, courts have tended to overturn prohibitions and overly stringent regulation of mobile homes. The Montana Supreme Court has ruled that a zoning ordinance that zones a very small percentage of land for manufactured homes may be an unconstitutional exclusion of manufactured homes (*Martz v. Butte-Silver Bow Government*).

Most communities today recognize the need to provide for mobile home housing. However, land use regulations often provide insufficient land for manufactured homes, either in courts or on individual lots. A tendency in some communities is to provide land for manufactured homes in areas that are marginally suited or less desirable for residential development -- along railroad tracks, near industrial areas, or in floodplains.

It is inappropriate to identify areas that are not compatible for conventional single-family residential development, and then crowd high numbers of people into high density manufactured home developments in those areas. Local governments need to identify adequate land and suitable sites for manufactured homes through their planning and regulatory process.

2. Regulating Community Residential Facilities

Sections 76-2-411 and 76-2-412, MCA, are intended to facilitate the location of group homes, "community residential facilities," in residential neighborhoods. These "community residential facilities include youth foster group homes, group homes serving eight or fewer disabled persons on a 24-hour-a-day basis, half way houses providing drug or alcohol rehabilitation, and adult foster family day-care facilities. These facilities must be allowed in any residential district, including single-family districts. For day-care facilities, local land use regulations may not impose any standards that do not apply to other residential uses. However, local regulations may treat 24-hour-a-day care facilities as conditional uses.

To be eligible for location in residential districts, community residential facilities must be registered or licensed by the appropriate agency, either the Department of Health and Environmental Sciences or the Department of Family Services. Unlicensed facilities are not "community residential facilities" and do not have a right to be located in residential districts *(Carey v. Wallner 43 St. Rptr. 1706, 725 P.2d 557, Mont. 1986).* The licensing or registration requirement does not apply to youth foster group homes, and therefore unlicensed youth homes must be allowed in any residential district.

VI. BASICS OF AN EFFECTIVE AND EFFICIENT REVIEW PROCESS

A. GENERAL

Typically, traditional zoning ordinances specify uses that are permitted in each zoning district as a right. These permitted uses must comply with the requirements specified for the district (e.g., setbacks, minimum lot size, maximum building height, off-street parking). The zoning officer reviews the application and determines whether the proposed use will conform to the regulations, and if so, is authorized to issue the zoning permit. The requirements are drafted in very specific language, usually as quantified dimensional standards. Thus, the zoning officer, reviewing the proposal against clear, specific standards, has to exercise very little judgement in determining whether the proposed use will conform to the regulations.

In contrast, some uses are not permitted by right because they may or may not be appropriate in a particular district depending upon the characteristics of the specific use or the district. For example, the location and nature of the proposed use and its projected environmental effects and other impacts such as the capacities of streets and other facilities, and physical environmental features, need to be considered in relation to the character of the surrounding development. These uses, commonly referred to as "conditional uses" or "special exceptions," generally require a more detailed review in order to assure that the uses are compatible with their locations and with surrounding land uses, and will further the intent of the zoning regulation and the objectives of the comprehensive plan. In addition, these uses may involve controversial issues that cannot be quantified.

As a result, determining whether a proposed use will be compatible requires judgement. As a "special exception" the decision, by statute, is vested with the board of adjustment and is made at a public hearing. As a "conditional use," the decision can be vested with an administrative officer, or as is common throughout Montana, it is vested with a permitting board (e.g., zoning commission or planning board), the governing body, or a combination thereof. Because conditional uses often have a significant impact, procedures for review and approval usually include a public hearing.

Through long experience with zoning, communities have determined which uses can appropriately be permitted by right (e.g., single-family residences, and small- or medium-sized commercial buildings), and which should be reviewed as conditional uses (e.g., shopping centers or large medical clinics). Although the long history of zoning has established commonly accepted uses permitted by right, a community still should give careful consideration to which uses are to be permitted by right and which are to be reviewed as conditional uses. In making these determinations, officials should balance the efficiency of administration with the community benefit of thoroughly reviewing development proposals that can impact the community.

With respect to development permit regulations, a number of appropriate options are available for reviewing proposals. As with zoning, the governing body is authorized to delegate approval powers to a permitting officer or board (e.g., zoning commission or planning board). However, many governing bodies are reluctant to delegate permitting authority and want to reserve the final decision to themselves. The elected officials are usually comfortable in having the zoning commission or planning board review a proposal and make recommendations, a process similar to subdivision review.

However, in communities that are experiencing significant development, the governing body may feel that it is appropriate to delegate some level of approval authority to a permitting board in order to handle the increased number of developments which must be reviewed. Most governing officials believe that some or all of the zoning commission or planning board members are appropriate to act as a permitting board. **It is important to understand that when planning board members act as a permitting board they do so by authority delegated under the zoning enabling acts, and not as a planning board, which is advisory only under Montana's Local Planning Enabling Act.**

For most local jurisdictions, two or more levels of development review are appropriate. A full review process with notice and public hearing and approval by the governing body might be needed for major developments such as shopping centers. A permitting board could be delegated authority for approving smaller proposals, such as a single commercial building or a housing development of 10 or fewer dwelling units. Usually the permit officer prepares a report and makes a recommendation to the permitting board or governing body. Where the governing body makes the final decision, the permitting board often makes a recommendation to the governing officials. **The key is to design a review and approval process that sufficiently considers a proposal's impact on the public, and that functions in a timely and convenient manner.**

Regardless of whether the permit officer, a permitting board, or the governing body issues conditional use permits, drafting the conditions that will apply takes careful thought. The land use regulations may set out conditions for each conditional use, or it may list general considerations or conditions that all conditional uses must meet. Where general considerations are listed, the permitting entity specifies the dimensions and specific requirements for each development proposal on a case-by-case basis. Many jurisdictions favor this approach because of its flexibility. However, disputes and accusations of arbitrary and discriminatory application of the regulations is reduced by writing the conditions as specifically as possible. The regulations should set forth the information needed for a conditional use permit application, and the procedures required for review, such as publishing notice and holding a public hearing.

B. PERMIT OFFICER

An administrative officer, or a permit officer, must be appointed to oversee and administer the land use regulations. The person usually receives the applications and reviews them to determine whether the information is complete. A permit officer should inspect the site

and prepare information (such as a staff report) about the proposal. The permit officer publishes a notice in the local newspaper and posts a notice on the site, sets up public hearings, and arranges to have minutes taken of hearings and meetings. Also, the permit officer might be authorized to issue permits for some types of uses. An important function is to assist the elected officials, planning board and board of adjustment in carrying out their responsibilities. The permit officer answers citizen and developer questions about the land use regulations.

Designating a person to serve as the permit officer is important to the success of the land use regulations. Where a staff planner is employed, that person is a logical choice for the position. The planning office usually is open during regular business hours, and is a convenient, available office for receiving applications for zoning or development permits.

In jurisdictions with no staff planner, finding an appropriate individual to serve as permit officer can be difficult, but is still very important. Appointing an existing local government employee is a possibility, but most municipal and county employees already work full time at their regular jobs, so they usually do not have extra time for the responsibilities of permit officer. Local employees that might be effective as permit officers include the county sanitarian, extension agent, or an administrative assistant to the county commissioners. Often there may be a retired or former local government employee or official that could assume the duties. Another alternative is to retain a reasonably available consultant to carry out the duties of permit officer on an as-needed basis.

The permit officer should receive some compensation for the time spent in performing the duties. One reasonable source of funding is to assess fees on applicants to help pay for the costs and time of conducting the development review.

> No matter who is designated to act as the permit officer, the person must be committed to the objectives of the land use regulations, become knowledgeable about the regulations, review procedures, and basic legal principles in administering the regulations, and be fair and impartial in dealing with the public.

C. PERMITTING BOARDS AND THE GOVERNING BODY

Most local land use regulations specify uses that are not permitted as a matter of right, because they could cause significant impacts or are controversial. Deciding whether to issue a permit requires judgement. Reviewing applications for these types of uses is appropriately performed by a commission or board rather than by one individual. Local officials not only must consider which uses should be reviewed by a board, they will want to carefully decide what board(s) should review certain land use proposals.

Some governing bodies want to make all final decisions on issuing permits. This approach can work well in towns and counties where development pressure is light and the governing body faces only a few applications. But in cities and counties experiencing growth, the number of applications for land use permits may become so large that the governing body – already facing a full agenda at its regular meetings – cannot effectively review the numerous permit applications.

All of the enabling statutes that authorize zoning and development permit regulations allow governing bodies to delegate permit–issuing authority to boards or a permit officer. For uses not permitted as a matter or right, local officials often delegate permitting authority to the zoning commission or planning board. Because these bodies usually were involved in drafting the land use regulations they often can appropriately handle a permitting role.

Montana statutes give zoning commissions and planning boards advisory responsibilities only. Therefore, when either entity is given permitting authority, it discharges those responsibilities, not as a zoning commission or a planning board, but pursuant to authority specifically delegated by the governing body under the applicable zoning enabling statute.

One approach is to establish three levels of review: (1) the permit officer acts on smaller, less complicated proposals such as a single–family residence or a small commercial building that can be permitted as a matter of right; (2) the permit board acts on larger, more complicated proposals such as mobile home parks or office complexes; and (3) the governing body acts on very large or controversial proposals such as large shopping centers.

D. BOARD OF ADJUSTMENT

Because no land use regulation can possibly anticipate all future eventualities, some means must be provided for granting relief from the regulations in appropriate situations. The means for providing this relief and giving the necessary flexibility to a zoning ordinance is the board of adjustment.

Some communities call their board of adjustment a "board of appeals," a "zoning board of appeals," a "zoning board," or other term. "Adjustment" may not be as descriptive a term as "appeals," but both of Montana's municipal and county zoning enabling acts refer to the board of adjustment as the agency serving the quasi–judicial appellate functions.

Under the County Zoning Enabling Act, a board of adjustment must be formed, and the board must comprise five members, whose terms are for two years. The Montana Supreme Court has ruled that a valid zoning regulation must provide an appeals process. The Municipal Zoning Enabling Act authorizes the formation of a board of adjustment, and nearly all municipal zoning ordinances in Montana incorporate a board of adjustment. Under the municipal enabling act, the board of adjustment comprises five to seven members, whose terms can be set by the ordinance.

The board of adjustment has three distinct functions:

1. to hear and decide on appeals of decisions made by the permit officer;
2. to hear and decide on special exceptions when authorized by the land use regulations; and
3. to grant variances (waivers) from the requirements of a land use regulation where special circumstances create a "hardship."

As a preface to explaining each of these functions, it is important to note that the board of adjustment exercises "quasi-judicial" powers. Regarding land use law and administration, the local governing body is the legislative, or policy-making authority; the administrative officer is the "executive" authority; and the board of adjustment is the "judicial" authority. This separation of power and function in land use regulation is important, just as the separation of powers is a vital part of American law in general.

The permit officer acts in an executive or administrative capacity to implement a land use regulation. The permit officer's actions may be appealed to the board of adjustment by an applicant (most likely where a permit was denied) or by a citizen (who probably feels harmed by a decision to issue a permit). The decisions and actions are reviewed, and can be upheld, modified or reversed by the board of adjustment. An appeal from a decision by the board of adjustment is made to district court. The judicial nature and function of the board is thus maintained by appealing to the court and not to the governing body.

The second function, granting a special exception, is often confused with the board's third function – granting a variance. The terms "special exception" and "variance" both imply that an exemption or waiver is involved. A variance is a waiver, but, as explained below, a special exception is not an exception or waiver at all.

Special Exceptions

A special exception is a use that is not permitted by right because the use may or may not be appropriate in a particular district depending upon the expected impacts of the proposed use. For example, the location and nature of the proposed use and its projected environmental effects and other impacts, such as the capacities of streets and other facilities, and physical environmental features, need to be considered in relation to the character of the surrounding development. A special exception does not require a showing of hardship as is required for a variance, but does require a more detailed review in order to assure that the use is compatible with the specific location and with surrounding land uses, and will further the intent of the zoning regulation and the objectives of the comprehensive plan. Uses identified as a special exception may be required to meet specific conditions that are identified in the regulations or may be reviewed according to general considerations on a case-by-case basis. As with conditional use permits (discussed on page 34), care should be given in drafting the conditions that will govern the granting of special exceptions.

Variances

The board of adjustment, in exercising its third function, granting variances, must determine that strict compliance with the regulations would create a practical difficulty or "unnecessary hardship." A variance is a waiver, and is granted to allow an applicant relief from the requirements of the letter of the regulations only where "unnecessary hardship" will occur. The hardship must arise from some circumstance associated with the particular property in question. For example, a variance may be granted because the shape, size or topography of the parcel precludes compliance with setback requirements. For example, and individual might own a lot with steep terrain so located that he simply cannot comply with the setback requirements of the ordinance – thus a "hardship" would occur if the requirements are strictly enforced. A variance from the setback requirements, granted by the board of adjustment, is the proper vehicle to enable him to build on the lot.

In addition to circumstances associated with the individual property, the regulations should require that an applicant for a variance demonstrate that the special circumstances do not arise from his own actions (such as dividing a larger parcel into lots), and that granting the variance will not give the applicant special privileges not enjoyed by other property owners. The financial status of the applicant or cost of construction do not constitute "hardship" for purposes of land use regulations.

Throughout the American experience with zoning, misuse of board of adjustment powers has undermined the effectiveness of many zoning ordinances. In most of these cases, the board thought issuing variances was serving justice or being fair. In the past, some boards of adjustment issued "use variances," which permitted uses in districts that were not allowed under the regulations. Local officials, in drafting land use regulations, prohibited certain uses in a district for a reason(s). When a board of adjustment issues use variances, the land use regulations can quickly become ineffectual tools for implementing the community's land use plans and policies. Also, granting use variances often results in "spot zoning." In the case of *Little v. Board of County Commissioners of Flathead County,* the Montana Supreme Court expressed its strong disapproval of spot zoning, describing the practice as allowing a use "... significantly different from the prevailing use in the area" and "... designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public."

Variances are not the proper means to remedy bad or poorly drafted land use regulations. The governing body, through the process of amendment, is the only proper mechanism for correcting flawed ordinances. The Municipal Zoning Enabling Act specifically allows local government to limit the powers of the board of adjustment. Therefore, in drafting land use regulations, municipal officials should clearly exclude the granting of use variances from the powers of the board of adjustment. It should reserve to itself the authority to revise regulations through the formal amendment process. The county enabling act provides no specific authority to limit the powers of the board of

adjustment, so county regulations should set forth explicit conditions under which the board of adjustment may grant a variance.

> A surge of requests for variances may be an indicator that a community's land use regulations need to be thoroughly reexamined and amended to correct problems.

OUTLINE OF ZONING REVIEW PROCESSES

ZONING PERMITS	CONDITIONAL USE PERMITS	VARIANCES; SPECIAL EXCEPTIONS; APPEALS	AMENDMENTS TO REGULATIONS AN ZONE CHANGES
Application submitted to Permitting Officer	Application submitted to Permitting Officer	Application submitted to Permitting Officer	Proposed amendment(s) submitted to Permitting Officer
↓	↓	↓	↓
Permitting Officer inspects site, makes report	Permitting Officer inspects site, makes report and recommendation	Permitting Officer inspects site, makes report/recommendation	Permitting Officer inspects site, makes report/recommendatio sends proposal to Zoning Commission
↓	↓	↓	↓
Permitting Officer issues Permit, or denies and informs applicant	Permitting Officer publishes notice of public hearing*	Permitting Officer publishes notice of public hearing	Permitting Officer publishes notice of public hearing
	↓	↓	↓
	Permitting Board holds public hearing	Board of Adjustment holds public hearing	Zoning Commission holds public hearing
	↓	↓	↓
	Permitting Board issues Conditional Use Permit, or denies, and informs applicant**	Board of Adjustment rules on variance, special exception, or appeal	Zoning Commission recommends to Governing Body
			↓
			Governing Body accepts, rejects, or modifies recommendations

* An alternative is for the permitting officer to directly issue the conditional use permit, o deny and inform the applicant.

** An alternative is for the Permitting Board to recommend to the governing body who eithe approves or denies the conditional use permit. The governing body may or may no conduct a second public hearing.

E. COORDINATING ENFORCEMENT OF ZONING AND DEVELOPMENT PERMIT REGULATIONS WITH OTHER REGULATIONS

Zoning, development permit, subdivision, floodplain, lake shore and "310" stream bank regulations can and should all be drafted to complement one another, minimize conflicting provisions, and provide for concurrent and consolidated review procedures wherever possible.

The various regulations should be drafted, or amended where necessary, to ensure that the substantive design standards required by each of the different regulations do not conflict with one another. Wherever possible, local officials should try to consolidate public hearings, site inspections, application reviews. The resulting decrease in review time and savings in staff time and costs benefit both citizens and developers.

Subdivision Regulations

Subdivision regulations govern the dividing of land into parcels, creating building sites, and providing public facilities. Zoning and development permit regulations focus primarily on regulating types of land uses and the location, size and use of buildings. Because subdivision regulations and zoning or development permit regulations have quite distinct purposes, conflicting requirements can be readily avoided. Local officials should carefully assess proposed zoning or development permit regulations, or proposed amendments to subdivision regulations to coordinate the design standards of both sets of regulations.

Several standards particularly need close consideration to ensure coordination between subdivision regulations and zoning or development permit regulations: size and shape of lots, design and spacing of access points, and the design of grading and drainage systems. Because the first step in most land development proposals is dividing land into building lots, subdivision review is the first public review process, and it is at that step that conformance with not only subdivision regulations but also with other regulations can be assured. During subdivision review, proposed plats should be checked to ensure that lots will be large enough accommodate buildings, set backs, off-street parking, utility easements and other requirements under zoning or development regulations.

A number of the review procedures for subdivision and zoning or development permit regulations can be conducted concurrently. For example, where a proposed development will include uses that require conditional use permits under zoning or development permit regulations, it is often possible to hold one hearing that can satisfy the public hearing requirements under both subdivision and zoning regulations.

Floodplain Regulations

Where a 100-year floodplain has been officially designated by the Department of Natural Resources and Conservation, any proposal for development within the floodplain must be granted a floodplain permit before proceeding with any development. The person

proposing the development submits an application to the local floodplain administrator, who reviews the application, inspects the site, and determines whether or not the proposal can be issued a floodplain permit.

In communities where a 100-year floodplain has been designated, zoning or development permit regulations can be readily coordinated with the floodplain regulations. Floodplain regulations apply to a very specific geographic area, and they are quite definitive regarding authorized development within the floodplain. Zoning or development permit regulations can be drafted to facilitate coordination by simply referring to the floodplain regulations and requiring, as one condition of permit approval, that a proposed development has been issued a floodplain permit.

The review process under local floodplain regulations usually does not include public hearings, which allows the review process to be expeditious and flexible. In many communities the same person serves as both floodplain administrator and zoning administrator, and that arrangement allows the person to consolidate site inspections and reviews of applications.

310 Permit Regulations

A person proposing an activity that would alter a stream bed or bank must apply for and receive a "310" permit under the Montana Natural Streambed and Land Preservation Act. Because 310 permits are administered by conservation districts any coordination between review of applications for 310 permits and for zoning of development permit regulations depends on cooperation between conservation district personnel and municipal or county officials. Fortunately, the specific, narrow focus of the 310 program – stream beds and banks – minimizes opportunities for conflict with zoning or development permit regulations.

VII. WORKING WITH THE PUBLIC

Because elected officials answer to voters, the citizens of a community are ultimately the public decision makers. They will determine whether the community supports a planning program and whether land use regulations are appropriate to implement the plan. The citizens of the community, working with the planning board, should be directly involved in determining the land use issues and problems affecting the community and in developing regulations. Citizens will have the final say on whether land use regulations are adopted and what requirements the land use regulations will contain.

Because the benefits of land use planning and regulation are often not obvious to the general public, it is vital to have an informed, involved citizenry. Elected officials, planning board members, and planning professionals must constantly work to ensure a fully informed and knowledgeable public.

One effective way to involve people is to establish a number of committees to address particular topics or represent geographic areas. People working together in groups usually become knowledgeable about community issues and supportive of solutions proposed by these groups. Also, holding a number of informal meetings throughout the jurisdiction is a good means to inform citizens and to build their trust in and support of the planning process. Also, many communities periodically conduct opinion surveys of residents. These surveys not only gather public opinion, they help make citizens aware of issues.

To examine key issues in depth, small "focus" groups comprising knowledgeable persons representing a cross section of the various interests in the community can be very effective. The small, manageable number of people can efficiently spend time in constructive discussion of land use concerns.

In a number of communities, planners or planning board members write regular columns in the local newspaper, explaining land use issues and possible solutions, and soliciting public response. These columns, as well as news articles, can be another means to communicate with the public.

> Opposition to planning and regulations often emerges from special interest groups. As growth pressures increase, the opposition sometimes becomes broader and more intensive. At the same time, however, citizens also become more motivated to support planning and to protect community values through land use regulations. Local officials should try to determine how the citizenry as a whole feels about a proposed regulation or a particular proposal, and not rely solely on the comments of the most vocal interests, pro or con.

VIII. PROMOTING AFFORDABLE HOUSING

A. WHAT IS AFFORDABLE HOUSING?

The term "affordable housing" may have a different meaning to different people. In this Handbook, affordable housing refers to a safe, decent dwelling that a family can buy or rent for not more than 30 percent of its net income.

In many areas of Montana, especially those that are experiencing rapid growth, the lack of affordable housing is at or near a crisis point. Out-of-state in-migrants, attracted to Montana by the perceived quality and simplicity of its lifestyle, are making an unprecedented impact on the cost and availability of housing stock. Increasingly, low- and moderate-income families are unable to afford safe and decent housing. This tremendous demand for housing, and the ability and willingness of in-migrants to pay high prices for housing (which inflates the cost of housing at all levels) is a major cause of the affordable housing crisis in Montana. Builders are focusing on construction of high-end housing because the profit margin is greater than in low and moderately priced housing. Not only is new lower cost housing not being built, the higher costs of materials and lack of interested contractors prevent many low- and moderate-income families from repairing and improving their present homes, causing a marked deterioration in the physical condition of housing units in many communities.

B. REGULATION AND AFFORDABLE HOUSING

Many people blame regulation for increasing the cost of housing. This blame is misplaced because other factors, such as high demand for high-end housing, cost of materials, and lack of building contractors, have had a much greater impact on housing costs. Nonetheless, individual ordinances and regulations may contain provisions that unnecessarily increase the cost of housing development, and local officials and citizens should reexamine their regulations with a view toward identifying and eliminating such provisions. The same sensitivity should be applied when regulations are initially drafted. Provisions that may unnecessarily increase the costs of housing development should be reviewed to determine whether they are really needed. **However, deregulation as a means of reducing housing and development costs is no substitute for sound, intelligent planning. In fact, lack of regulation often increases housing costs.**

C. ENSURING ADEQUATE LAND IS AVAILABLE FOR AFFORDABLE HOUSING, AND REMOVING LAND USE BARRIERS

In some communities in Montana part of the housing shortage results from land use regulations that do not provide sufficient land in suitable locations for residential development. In a number of communities, citizens do not look favorably on mobile homes, rental housing and multi-family housing, so inadequate areas are zoned to allow

these types of housing, which today are essential to providing affordable housing. To determine an adequate amount of land needed for affordable housing, local officials should examine current and projected levels of population and numbers of low- and moderate-income households. One important aspect of comprehensive planning is identifying suitable areas for residential development including adequate areas for low cost housing. Local officials should avoid planning and zoning for low cost housing in less desirable areas such as those located adjacent to industrial areas or railroad tracks. Wherever possible, the local government should provide water and sewer services to areas planned and zoned for affordable housing.

Though most communities recognize the need to adopt reasonable land use standards in subdivision and zoning regulations, a number of local regulations still contain unjustifiable barriers to affordable housing such as:

- Zoning insufficient land for mobile home, modular and multi-family development.

- Requiring unnecessarily large minimum lot sizes or lot frontages.
  Land costs typically represent approximately 25% of housing development costs, so excessive minimum lot requirements can significantly increase housing costs.

- Requiring unnecessarily large minimum front, side and rear yards.
  Some distance between the house and the street is appropriate, but requiring more than approximately 25 feet does little except to reduce the buildable area of the lot. Side yard requirements often result in two unusable areas, whereas allowing the house to be built up to the side lot line on one side (zero lot line) allows one usable area on even a small lot.

- Requiring unnecessarily large minimum floor areas for homes.
  The overall floor area of the house is not really a health and safety issue. More important is that the individual rooms are large enough to offer a healthy and safe living environment. Requirements on the minimum size of rooms can be reasonably required and still allow construction of affordable housing. Guidance on minimum room size, which is consistent with providing affordable housing, is offered by the Council of American Building Officials:

  > Room Sizes: Every dwelling unit shall have at least one habitable room which shall have not less than 150 square feet of floor area. Other habitable rooms shall have an area of not less than 70 square feet. Every kitchen shall have not less than 50 square feet of floor area.

- Unnecessary limits on densities.
  Often local zoning limits densities with excessive minimum lot sizes, or by setting low density standards for multi-family development. Local officials should re-assess their ordinances to determine whether density restrictions are reasonable, and whether some of the perceived problems (e.g., traffic and parking) can be

addressed through street planning and requirements for off-street parking. Building affordable housing is facilitated by higher density construction. Builders might be provided density bonuses for including low-cost housing in their development plans.

- Restrictions on home occupations.
  Many ordinances have tight restrictions on home occupations, partly out of concern for increased traffic, parking, noise and congestion in residential neighborhoods. Also, home occupations are perceived to detract from the commercial district. However, for a number of reasons, home offices and home occupations are a growing trend. Allowing certain business activities to be carried on in residences reduces home-to-work travel, thereby reducing traffic volumes, conserving energy, and assisting low-income families in earning a living. Local regulations could allow home occupations as a right under reasonable requirements, rather than require conditional use permits or special exceptions. Also, existing restrictions on home occupations should be reassessed for reasonableness.

- Prohibiting conversion of large single-family homes into two affordable dwelling units.
  Ordinances can facilitate affordable housing by allowing single-person apartments to be created in single-family dwellings. These new units are often suitable for elderly or disabled family members.

- Requiring excessive minimum street widths or minimum cul-de-sac standards.
  While wide streets give a community a spacious, pleasant appearance, they add considerably to costs of construction, paving and maintenance, remove land from the development and tax base, and can increase runoff from storms. Fire officials advocate wider cul-de-sacs to maneuver large emergency vehicles. But local officials should consider the advantages of narrower streets and cul-de-sacs. In addition to saving land, construction, and maintenance costs, narrow streets tend to lower traffic speeds, which increases safety.

  Cul-de-sacs do not have to be larger than 60 feet in diameter because fire trucks and other equipment can maneuver by making one backing motion, and the driver normally has accompanying personnel to guide the vehicle when backing. In fact, a "T" turn-around allows vehicles to turn around with one simple backing motion, and requires approximately one-sixth as much land.

- Requiring curbs, gutters or large culverts.
  Local regulations should allow optimum use of grass swales and natural terrain to handle drainage wherever possible.

- Regulations should allow medium and high density developments (such as duplexes, four-plexes, and apartments) as a matter of right in certain zones.
  By avoiding rezoning, hearings, and special use or conditional use procedures, developers would have more incentive to provide higher-density, lower-cost housing.

APPENDIX A

DRAFTING CONCERNS

The following technical discussion addresses essential elements of any land use regulation. These elements must be handled properly, both to ensure legally sound regulations and effective, workable administration and enforcement.

A. BOARD OF ADJUSTMENT

An appeals body, such as a board of adjustment, not only is legally required as part of land use regulations, it serves an essential practical function. Establishing a board of adjustment with appropriate but limited powers and with concerned members is vital to the long-term success of the land use regulations.

The Municipal Zoning Enabling Act authorizes and the County Zoning Enabling Act requires formation of a board of adjustment to 1) hear and decide appeals regarding zoning actions, 2) grant special exceptions, and 3) grant variances. The County Planning and Zoning Commission Act specifies that the board of county commissioners may grant variances from the regulations, and that appeals of administrative actions must be made to district court.

1. Variances

Both zoning and development permit regulations need a variance procedure to waive a standard for a particular property where strict enforcement of the standard would create a "hardship" for that property. However, to be entitled to a variance, the applicant must demonstrate:

a. That special conditions and circumstances exist that are peculiar to the land, structure, or building involved and that are not applicable to other lands, structures, or buildings in the same district.

b. That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district.

c. That the special conditions and circumstances do not result from the actions of the applicant.

d. That granting the variance requested will not confer on the applicant any special privilege that is denied by the regulations to other lands, structures, or buildings in the same district.

A municipal zoning ordinance should be drafted to allow the board of adjustment to grant variances **only** from the standards. The regulations should not allow the board of adjustment to issue use variances, that is to allow uses that are otherwise prohibited by the regulations. As pointed out in Chapter VI, the intent and effectiveness of many land use regulations have been undermined by the indiscriminate granting of use variances by boards of adjustment. The following is suggested language that could be included in a zoning regulation to prevent misuse of board of adjustment powers:

> Under no circumstances shall the board of adjustment grant a variance to allow a use not permitted under the terms of these regulations or any use expressly or by implication prohibited under the terms of these regulations.

Because the County Zoning Enabling Act does not give counties specific authority to limit the powers of a board of adjustment, county officials may want to incorporate more specific criteria to govern the board of adjustment's approval of a variance request. For example, the regulations might require that the result of issuing a variance would not conflict with the comprehensive plan, or that issuing a variance would not result in "spot zoning."

2. Special Exceptions

The Municipal Zoning Enabling Act and the County Zoning Enabling Act both authorize the board of adjustment to grant "special exceptions." While the term "special exception" implies that a waiver or exemption is granted, Section VI of this Handbook explains that this is not the case. Where specifically allowed by the local land use regulations, the board of adjustment may issue a permit for a use identified as a special exception, if the proposed use meets the requirements set forth for special exceptions in the regulations. As opposed to variances, no finding of hardship is necessary in order for the board of adjustment to issue a permit as a special exception. Where local regulations authorize review and permitting of special exceptions, the specified uses typically are large developments, or are of a nature, that significant impacts to the community may occur. Such development proposals are subjected to a more in-depth review to minimize or overcome the potential problems or impacts. The additional requirements that special exceptions must meet usually are similar to those outlined below for conditional uses.

B. CONDITIONAL USE PERMITS

Many Montana communities are using "conditional use permits" as a means to give in-depth review to proposed uses that may be complex or large, or that otherwise may have substantial impact on the community. Unlike special exceptions which must be reviewed and permitted by the board of adjustment, conditional uses may be reviewed and approved by any of several different bodies: the permit officer, zoning commission, planning board, or the governing body. A local government's flexibility to select a review agent or body is one reason for the modern trend toward conditional use permits.

A conditional use permit can be a useful tool that allows local governments to conduct a more intensive review of certain types of development proposals to alleviate incompatibilities among uses or prevent potential impacts. A number of considerations are important to make effective use of conditional use permits. Careful thought should be given to 1) the uses that would be reviewed as conditional uses, 2) the conditions that conditional uses must meet, 3) whether the permitting officer, permitting body (e.g., the zoning commission or planning board) or the governing body will issue conditional use permits, and 4) what review procedures will apply, such as holding a public hearing, notifying adjacent property owners, or requiring a recommendation by the permit officer or permitting board.

As a general guideline, land use regulations should allow as many uses as possible as a matter of right, and only review uses as conditional uses where real potential impact on the community might occur. Most regulations require notice and public hearing as part of the procedures for reviewing conditional uses. As a benefit to landowners and the persons involved in the review, this process should be applied only to those uses where thorough examination is warranted. Typically, large developments have significant community impacts and thus are reviewed as conditional uses, such as shopping malls, large housing or commercial developments, or large mobile home parks.

A second important consideration is whether the regulations will set out specific conditions for each conditional use, or will set out general conditions that apply to all uses and allows the board of adjustment to set the specific standards for each proposed development on a case-by-case basis. The following are examples of general conditions that would apply to all conditional uses identified in the regulations:

- Adequate ingress and egress to property and proposed structures with particular concern for automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or other emergency.

- Adequate off-street parking and loading areas, where required, with particular attention to access, traffic flow and vehicular and pedestrian safety.

- Location of garbage containers and garbage pickup with respect to traffic flow and access, odor, and vehicular and pedestrian safety.

- Availability and compatibility of utilities in suitable locations.

- Adequate screening and buffering, with attention to type, dimensions and character.

- Signs, with attention to preventing glare and promoting traffic safety, economic effect, and harmony with adjacent properties.

- Required yards and open space.

- General compatibility with adjacent and other properties.

Local officials tend to favor the approach of using general criteria and setting specific conditions on a case-by-case basis because of the flexibility. However, drafting conditions as definitively or specifically as possible reduces disputes and accusations of arbitrary and discriminatory application of the regulations.

The following are examples of specific conditions that apply only to the particular designated conditional use:

Conditional Use:	Conditions:	Purpose of Regulation:
(1) Meat packing plant.	a. Any building or structure used to retain animals or process animal products must be at least 300 feet from a residential district or institutional use.	a. Reduce off-site odors. b. Reduce off-site noise.
	b. A solid fence at least 8 feet high must enclose the use, or a screen of evergreen shrubs or trees at least 8 feet high at maturity must be planted. The fence or screen must be maintained.	a. Reduce off-site noise. b. Reduce off-site light. c. Enhance aesthetics.
(2) Bulk, above ground, storage of flammable liquid or gas products.	a. All uses must be set back 300 feet from all lot lines.	a. Public safety
	b. All uses must conform to the city's Municipal Code: Petroleum Storage Tanks."	a. Public safety

A third important consideration is determining the entity that will review and issue conditional use permits. A local land use regulation can vest the authority in any one of a number agencies, such as the permitting officer, zoning commission, planning board, some other permitting agency, or the governing body.

C. NONCONFORMING USES

Effectively dealing with nonconforming uses and other nonconformities requires careful consideration in drafting land use regulations. The County Zoning Enabling Act requires that nonconforming uses of land and structures be allowed to continue. The Municipal

Zoning Enabling Act does not mention nonconforming uses, but municipal officials should include a provision to prevent their zoning ordinance from rendering an existing legal use illegal at the time the ordinance is enacted. However, local governments are not required to encourage the long-term survival of nonconforming uses and structures. In fact, as discussed on page 54, under certain circumstances some nonconforming uses can be required to be removed after a period of time.

Local officials should have a thorough grasp of nonconformities. The term "nonconforming use" is most frequently used, but there are other types of land use nonconformities.

- Nonconforming lots: lots that do not meet requirements such as minimum size, minimum frontage or width:depth ratio.
- Nonconforming structures: structures that do not meet requirements such as minimum floor area, maximum height, or setbacks.
- Nonconforming uses of land or structures: a conforming structure may house a use that does not conform, such as manufacturing in a commercial building.

Usually, nonconforming uses (such as a commercial use in a residential district) are the most common types of nonconformities, and are the most troublesome in terms of adverse impact on the public interest. Careful thought in setting district boundaries is important to the success of a traditional zoning regulation, and local officials should respect the existing land use pattern and draw boundaries and include permitted uses to minimize the number of nonconforming uses. As a guiding principle, local officials should allow as a permitted use any use that will not adversely affect the public interest. If local officials do not have reasonable arguments that a use will adversely impact the public health, safety and welfare, they should permit the use as a right in the district. There should be as little disruption as possible of established land use patterns.

An exception to the above principle might occur where a community has identified a local asset, such as an historic area, and further incompatible nonconforming development will continue to diminish the value of the asset.

The purpose of drafting nonconformity provisions in land use regulations is to recognize that nonconformities must be allowed to continue, but that the local government is not encouraging their long-term existence. Land use regulations should have a separate section addressing nonconforming uses, lots, and structures. An important part of this section will be the purpose statement that expresses the intent of how the local government views and will handle nonconformities.

Generally, if a nonconformity ceases because of an "act of God" (e.g., fire or flood), economics, or other cause, it may be prohibited from resuming.

Nonconforming Lots

Under established legal principle a person must be able to have an economically viable use of his or her property. As a result, a person may need to apply for a variance in order to make use of a nonconforming lot. A lot with 25 feet of street frontage (thousands of 25-foot lots were created in the early platting of Montana cities and towns) may not conform to minimum lot frontage or size requirements under current land use regulations, or a structure may not be practically built in compliance with the side yard requirements of these regulations. Although the lot is nonconforming it may still be used for any use permitted by the regulations. The owner must apply for a variance for the side yard requirements to allow enough building width to construct a reasonably sized building.

However, where a person owns two or more contiguous unimproved lots, he should not be granted a variance where he is capable of using a combination of his lots to create a conforming building lot(s) to achieve the same goal.

Nonconforming Structures

A house, for example, may have a garage or porch that encroaches into a required side or front yard area (the structure existed at the time the land use regulations were enacted). The land use regulations should prohibit enlargement of the nonconforming portion of the structure, but because repair and maintenance are always necessary to prevent deterioration and decay, these activities should be allowed.

Removal (Amortization) of Certain Nonconformities

Land use regulations may establish a process to remove certain nonconforming uses. The process usually works best with uses that are of relatively low value, and that have a relatively short useful life, such as signs and billboards, or are particularly objectionable or require a minimum investment in permanent capital facilities. The regulations can require that such uses be phased out, or "amortized," and eliminated after the time of the useful life of the structure has passed (e.g., 3-5 years for most signs or billboards). The rationale for such provisions is that the owner will have recouped his investment by the end of the amortization period and thus will not suffer economic loss. Also, the establishment of periods of useful life imply that the structure will need major repair or replacement at the end of the period, and therefore, in light of those costs, requiring removal would be reasonable.

In some situations, a nonconforming use may occur in a conforming building, and the owner may be reasonably required to discontinue the use or convert the structure to a conforming use after a reasonable period of time. A land use regulation may require prohibited businesses (e.g., adult bookstores or movie theaters) to discontinue operating at its existing location provided the business owner: 1) is under no obligation to remain at its present location, 2) could economically establish and operate a conforming business at the same location, and 3) has been given ample time to prepare to move and recoup

his investment in the present location.

Amortizing and Removing Mobile Homes

Local government may require the eventual removal of nonconforming mobile homes, provided that the land use regulations provide a reasonable procedure. Two key requirements are that 1) a reasonable amortization period (e.g., 10 years) is provided, and 2) a reasonably priced and conforming site is available for the mobile home, or that an alternative suitable affordable housing unit is available for the mobile home occupant.

D. THE 12-POINT "LOWE" TEST

In 1974, the Montana Supreme Court ruled *(Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551, 1974)* that when cities and towns propose zoning or rezoning, they must consider the 12 points set forth in 76-2-304, MCA, the purpose section of the Municipal Zoning Enabling Act. The Court further ruled in 1979 that a zoning regulation or rezoning is invalid unless it is enacted in accordance with the 12 criteria (the 12-point Lowe test). The County Zoning Enabling Act sets forth the same 12 points in 76-2-203, MCA, and therefore counties presumably must also meet the Lowe test in adopting land use regulations. The 12-point Lowe test does not apply to land use regulations adopted under the County Planning and Zoning Commission statute 76-2-101 through 76-2-112, MCA.

To meet the 12-point Lowe Test, a municipality or county should, as a minimum, list the 12 points in the purpose section of their local land use regulations. To give greater legal support to the regulations, local officials should ensure that the minutes of planning board or governing body meetings show that the 12 points were considered and how the proposed regulations conform to the 12 points. The permit officer's staff report to the permitting board (zoning commission or planning board) or governing body should list the 12 points and may provide tentative recommendations on how they apply to the proposal. Under the 12-point test local officials must consider whether a proposed land use regulation or amendment:

1. Is designed in accordance with the comprehensive plan.
2. Is designed to lessen congestion in the streets.
3. Will secure safety from fire, panic and other dangers.
4. Will promote health and the general welfare.
5. Will provide adequate light and air.
6. Will prevent the overcrowding of land.
7. Will avoid undue concentration of population.
8. Will facilitate the adequate provision of transportation, water, sewerage, schools, parks and such other public requirements.
9. Gives reasonable consideration to the character of the district.

10. Gives reasonable consideration to the district's peculiar suitability for particular uses.
11. Gives reasonable consideration to conserving the value of buildings.
12. Will encourage the most appropriate use of land throughout the jurisdictional area.

E. MONTANA SUPREME COURT DECISION: *LITTLE V. FLATHEAD*

In deciding *Little v. the Board of County Commissioners of Flathead County*, the Montana Supreme Court established a number of important principles regarding the adoption of land use regulations.

1. Conformance of Regulations to Comprehensive Plan

The Supreme Court gave the comprehensive plan unusually strong authority in local land use decision making and issuance of building permits. The court ruled that zoning regulations must substantially adhere to a comprehensive plan, and further that a municipality may refuse to issue a building permit for a proposed use if the use does not conform to an adopted comprehensive plan.

In the *Little* case, the city-county plan identified a tract outside the city limits as residential, and the area surrounding the tract was existing residential. Because the area containing the tract in question was unzoned, the county proposed to zone the tract commercial to accommodate a proposed shopping center. The city, with extraterritorial powers to issue building permits, was prepared to issue a building permit for the shopping center.

Culminating a series of legal challenges and appeals, the Supreme Court ruled that the county could not zone a tract commercial where the adopted comprehensive plan proposed that the area be residential. The Court further ruled that the city could refuse to issue a building permit – even in an unzoned area – for a use that did not conform to a comprehensive plan.

2. Spot Zoning

In the *Little* case, the Supreme Court also held that when the county proposed to zone the subject tract commercial, despite the fact that it was surrounded on three sides by residential development and that the comprehensive plan recommended that the land be used for residential, the proposed zoning would be spot zoning. Spot zoning occurs, the Court declared, when a local government zones or rezones a relatively small area for a use that is significantly different from prevailing uses in the vicinity, and the zoning action is designed to benefit only one or a few landowners at the expense of surrounding landowners or the general public.

3. Planning Board Recommendation Required

The Court made another major ruling in the *Little* case by holding that the County Zoning Act requires that the planning board submit to the governing body recommendations on a proposed land use regulation before the regulation may be adopted. The Court made clear that before a board of county commissioners may proceed with adopting land use regulations it must receive a written report from the appropriate county or city–county planning board.

F. STATEMENTS OF INTENT

Drafting a definitive statement of intent for each zoning district, the regulations as a whole, and each key section is very important, but can be difficult. Writing statements of intent is useful for all persons involved in drafting land use regulations because the statements are able to articulate the community's expectations for each use district and the regulations as a whole. Statements of intent also help a court interpret the land use regulations should litigation ever occur.

A definitive statement of intent will help local officials determine appropriate requirements, permitted uses, conditional uses, and prohibited uses for a district. For example, a clear statement of intent makes it easier to decide what businesses should be allowed in a commercial district. Certain key sections of land use regulations, such as those dealing with nonconforming uses, or the granting of variances and conditional use permits, can be more effectively administered if a definitive statement of intent is included.

G. PUBLIC NOTICE REQUIREMENTS

1. Time Period of Notice

Publishing or posting notice of public hearings is a vital part of a number of procedures involved with adopting and enforcing land use regulations. Public hearings are required by law when the governing body adopts or amends zoning or development permit regulations, and when a board of adjustment hears an appeal, or request for a variance or special exception. Public notice of these hearings are required to be published in a newspaper of general circulation. Under the municipal zoning statute the city council must publish notice of its public hearing on adopting or amending a zoning ordinance at least 15 days prior to the hearing. County commissioners, under the county zoning statute, must hold at least two hearings as part of the process of adopting or changing land use regulations. The statute specifies that the commissioners must publish notice of each hearing once a week for two weeks.

Under the county planning and zoning district statute, the planning and zoning commission must hold a hearing before creating or changing a development district. In

this case, the statute specifies that notice of the hearing shall be posted in at least three public places at least 15 days before the hearing.

Under the enabling statutes for municipal and county zoning, appeals and requests for special exceptions or variances made to the board of adjustment require public notice and a hearing. However, no time periods governing notice are specified. Unless set out in the local land use regulations, the board of adjustment must set its rules governing hearings and notice. Montana law does not require public hearings for other actions, such as issuing conditional use permits, but a hearing and notice are usually required by the local regulations. Where no statutory mandate exists for public notice, the 15-day or 2-week time period is typically specified in the local zoning or development permit regulations.

Municipalities and counties served by weekly local newspapers should consider the day of the week that the local newspaper is published in comparison to the day of the regular meeting of the governing body, permitting board and board of adjustment. Weekly newspapers are typically published on Wednesday or Thursday of each week, while city councils and boards of county commissions usually hold their regular meetings on Monday or Tuesday. A 15-day notice requirement could require publication of notice in an issue three weeks prior to the hearing at a regular meeting. A number of smaller communities that are served by weekly newspapers require only a 7- to 10-day notice to prevent an unreasonably lengthy time between publication of notice and the hearing.

2. Content of Notice

The public notice not only must be timely, it must provide the information needed to inform the public. The county zoning statute specifies the content of the hearing notices, and this statutory direction is sound guidance for nearly all public notices:

a. the boundaries of the proposed district;
b. the general character of the proposed zoning regulations;
c. the time and place of the public hearing;
d. that the proposed zoning regulations are on file for public inspection at the office of the county clerk and recorder.

Notices of hearings regarding such matters as board of adjustment meetings, or requests for conditional use permits must be tailored to the subject of the hearing, but critical information needed by the public must be included.

Notices of public hearings are usually published as legal notices, but to inform a broader segment of the public, display advertisements in the local newspaper probably is a preferred alternative.

APPENDIX B

CHECKLIST: ADOPTING AND UPDATING LAND USE REGULATIONS

The following checklist is intended to assist persons drafting local land use regulations to include required components and highly-recommended elements in the regulations, and to ensure that the local government follows proper procedures in preparing and adopting the regulations.

A. REQUIRED COMPONENTS IN LOCAL LAND USE REGULATIONS

The Regulations must:

___ 1. Substantially conform to an adopted comprehensive plan that covers the jurisdiction of the applicable planning board.

___ 2. Meet the "12-point Lowe" test:
___ a. List the 12 points in the Purpose Section.
___ b. Maintain a record showing that local officials considered how the regulations would meet the Lowe test.

___ 3. Provide for the continuation of nonconforming uses, structures and lots.

___ 4. Provide procedures for (1) hearing appeals from decisions of the permitting officer or board and (2) issuing variances.
___ a. A board of adjustment is authorized under the Municipal Zoning Enabling Act and is required under the County Zoning Enabling Act; appeals from the board of adjustment are directed to district court.
___ b. Under the County Planning and Zoning Commission Act, the board of county commissioners issue variances; appeals of permitting decisions are directed to district court.

B. COMPONENTS RECOMMENDED FOR INCLUSION IN LOCAL REGULATIONS

The Regulations should:

___ 1. Provide a statement that production of agricultural, timber and mining products are not subject to the regulations (mining activities may be regulated under the County Planning and Zoning Commission Act).

___ 2. Provide clear direction for administration and enforcement of the regulations, including the roles and responsibilities of the permitting officer, permitting board, and board of adjustment, as applicable.

___ 3. Provide definitive Statements of Intent:

___ a. In the Purpose Section of the regulations.

___ b. For each use district.

___ c. For key sections such as those addressing nonconforming uses, the board of adjustment, conditional uses, and signs.

C. REQUIRED PROCEDURES FOR PREPARING AND ADOPTING REGULATIONS

___ 1. The appropriate advisory body must prepare recommendations for the governing body:

___ a. A zoning commission for municipal land use regulations.

___ b. The appropriate planning board for county land use regulations.

___ c. The county planning and zoning commission for regulations under county planning and zoning districts.

___ 2. The governing body must:

a. publish notice conforming to the applicable zoning enabling statute.

b. hold a public hearing.

___ 3. After the hearing, the governing body takes appropriate action:

___ a. Under county zoning the county commissioners:

___ ▪ pass a resolution of intention to adopt land use regulations.

___ ▪ publish notice of the resolution of intention once a week for two weeks.

___ ▪ provide a 30-day period to receive protests from property holders.

___ ▪ may adopt by resolution the land use regulations, provided 40% or more of the property owners have not protested adoption of the regulations.

___ b. Under municipal zoning the city council or commission may adopt the land use regulations by ordinance.

___ c. Under a county planning and zoning commission the county commission may adopt the land use regulations by resolution.

APPENDIX C

CREATIVE LAND USE REGULATIONS – NEW SOLUTIONS

Land use planning and regulations can be used to protect or enhance certain community values, such as productive agricultural land, river corridors, critical wildlife habitat, wetlands, or historic features. Drafting land use regulations to protect community values such as these requires great care and thought to ensure constitutional validity.

A number of key elements are necessary in order to address any of these special community values:

- There should be strong community support for protecting the identified community value(s).
- The comprehensive plan should clearly state that preserving these values is in the public interest and is a community goal.
- The plan should offer supportive evidence of the importance of the community value.
  - Articulating economic value provides strong legal foundation for preserving a community attribute, but the value can be other than economic. Historic, cultural, or aesthetic character also can be important to a community and provide a valid basis for land use regulation.
- The plan should express definitive policies to guide local government development decisions.
- The regulations should be reasonable.
  - Regulations should go no further than necessary to achieve the goal.
  - Regulations should not substantially increase the cost of development, nor deprive the property owner of all reasonable economic use of the property.
- The purpose section of the regulations and the statements of intent for each use district should be worded carefully to clearly state the intent of the regulations.

A. PROTECTING AGRICULTURE AND PRESERVING AGRICULTURAL LAND

An objective of many county planning programs is to protect agricultural operations and preserve agricultural land. In most Montana counties, agriculture is the dominant basic industry. Nearly every county has productive agricultural land that is important to the county: irrigated land, land growing key crops such as sugar beets or specialized grains, or limited private hay lands in mountain valleys that are vital to sustaining a large livestock industry through winter months.

The land use that most frequently conflicts with agricultural land preservation is residential subdivision development. A community's program to preserve agricultural land and open space should address subdivision development.

Despite the community benefits of protecting agricultural land, a number of people tend to oppose substantial restrictions on land. Effectively preserving agricultural land and open space requires thought and careful consideration, not only to minimize citizen resistance, but also to ensure that any regulations are legally sound.

One necessary element of protecting agricultural land through land use regulations is to make a clear public statement (typically in the comprehensive plan) that agriculture is important to the community and preserving agricultural land is a community objective. The following is an example of a statement declaring that agriculture is important to the county:

> Agriculture is the dominant basic industry in the county, providing most of the basic industry employment, gross income and a significant portion of the county taxable valuation. Particularly important to the local economy are the irrigated lands that produce valuable cash crops, and the private hay lands in the mountain valleys that provide essential winter feed, sustaining the livestock industry.
>
> We need to protect farming and ranching operations from conflicting land uses, and to preserve the most productive agricultural lands.

To justify land use regulations and other measures used to protect agricultural land, local officials need to demonstrate the importance of agriculture and agricultural land. The plan should provide economic data showing the level and relative importance of agricultural gross income and employment to the county. The amount of agricultural land, including hay land, irrigated land and cropland should be determined to show the productivity and monetary value of agricultural land to the county. Also, information regarding the taxable value of various types of agricultural lands and properties will show the relative importance of agriculture's contribution to the tax base.

Employment and income data are available from the Census and Economic Information Center in the Department of Commerce. Taxable valuation and tax revenue information can be obtained from the county assessor and treasurer. Additional agricultural information can be obtained from the annual Montana Agricultural Statistics, available from the Montana Agricultural Statistics Service in Helena.

In addition to presenting data showing the economic importance of agriculture, the plan should set forth goal and objective statements regarding protection of agriculture. For example:

- Goal: To protect the agricultural industry and the agricultural land base of the county.

- Objectives:
  - To preserve and maintain productive agricultural land for continued agricultural uses.
  - To maintain and expand productive agricultural activities in the county.
  - To discourage future development that is incompatible with agricultural operations.

Policy statements clarify how local government development decisions should carry out the goals and objectives. For example:

- Provide expedited subdivision and zoning review and approval for development proposed in or near existing communities (this could also include additional expedited review of affordable housing proposals).

- Deny subdivision proposals creating large residential lots on productive land.

- Designate less productive or unproductive agricultural land for development.

- Encourage a compact and clustered design for any development proposed on productive agricultural land.

Where the plan provides data showing agriculture's importance to the county, makes clear goal and objective statements, and expresses definitive policies regarding the protection of agriculture, the local government has a sound basis for adopting land use regulations to limit or manage growth on key agricultural lands.

An effective complement to land use regulations as a means of preserving agricultural land is the adoption of a resolution requiring that all proposed subdivisions conform to the comprehensive plan – and, thus, to the adopted development policies that are part of the plan.

Zoning Land for Agricultural Uses

In some communities local officials or a segment of the residents may wish to simply zone productive agricultural land exclusively for agricultural uses. Local officials should be careful because this approach has the potential to create political controversy. Farmers and ranchers tend to oppose regulations that would leave them with no economic uses of their land other than raising livestock or growing crops.

The question of whether agricultural lands should be zoned strictly for agricultural uses can be complex. Local officials need to work closely with the agricultural community to determine the level of interest in and support for agricultural zoning. All options for preserving agricultural land should be explored. In some cases, implementing policies regarding public facilities, placing limitations on subdivision development, and encouraging compact or clustered development can effectively help preserve agricultural land.

In communities where public sentiment favors zoning agricultural land, local officials should ensure that the regulations will be legally sound. First, the elements described on page 61 are in place. In addition, local officials should develop the case that prohibiting non-agricultural uses is necessary to achieve the community goal of preserving agricultural land, and that effective preservation cannot be achieved through less restrictive regulations or measures. Local officials also need to demonstrate that the lands zoned agricultural can, in fact, be economically used for raising livestock or growing crops. For example, productive lands (e.g., fertile soils to grow crops or vigorous vegetation to support livestock) may provide economic returns even during periods of low prices. Also, the presence of irrigation often means that the land likely would be productive even during times of drought.

Local officials might consider "softening" the impact of an outright prohibition by allowing some latitude. For example, allowing the creation and sale of several acres from a farm for building sites rarely will undermine the objective of preserving agricultural land and open space, but can make the regulations less strict, and more acceptable. A zoning regulation can also allow clustering of development that limits the development to a small portion of a ranch or farm.

B. PROTECTING OTHER COMMUNITY VALUES: RIVER CORRIDORS, CRITICAL WILDLIFE HABITAT, WETLANDS

Local governments may be interested in a number of community values associated with rivers and stream corridors: maintaining natural stream banks and stream beds, minimizing sedimentation or contamination, protecting a scenic view, restricting new stream-side development. Likewise, a community may believe that local wetlands or critical wildlife habitat are important assets that should be protected from haphazard development. Local officials may adopt regulations pursuant to a comprehensive plan and the appropriate zoning enabling act to protect these assets. The plan should clearly articulate the attributes to be protected and specify that such protection is a public purpose and community goal. The plan should provide as much data and specific information as possible to explain how the proposed protection is in the public interest.

C. HISTORIC PRESERVATION

Many communities wish to preserve the historic heritage represented by older

neighborhoods or core areas. Historic preservation includes both saving older and historic buildings, and ensuring that improvements and new structures are designed to harmonize with the historic character of the area. Ensuring harmony of site and architectural design is accomplished by requiring that development proposals be submitted to a design review board for approval.

A first step in historic preservation is to systematically examine or survey the area to define the boundaries and valuable features of the historic district. The community should determine what blocks to include and what features define the historic values, such as curved or diagonal streets, intricate carvings, brick work, or unique windows. (The Montana State Historical Society, located in Helena, can provide information and guidance on historical surveys and features.) With these considerations in mind, the community should be able to determine the boundaries of the historic district and specify the appropriate standards that might apply.

The statement of intent is particularly important for a historic district that is part of a land use regulation. The success of the district and regulations depends in large part upon a clear statement of the purpose and expectations of the historic district. Another key factor is that historic district regulations are reasonable, allowing use of materials that are available and feasible today. It may be impractical and unfeasible to require use of a certain type of brick or window that is not available or too costly to manufacture. It is reasonable, however, to require that landowners conform to certain acceptable requirements in retaining the general prevailing architecture in the district.

Sign requirements in historic districts usually are important, but may be difficult to draft. Signs in the past functioned differently than today's neon and electric signs. The older signs were used primarily to designate the location and function of the business. The sign provisions in the historic district should encourage replication of typical sizes, colors, materials and types of lettering used on old signs, as well as creative use of symbols such as the striped barber pole and shoemaker's boot.

Compactness often is one of the unique characteristics of historic areas. Walking was common in times past, and high-density, compact development accommodated pedestrians. This compactness often is a feature that should be retained. Regulations for historic districts often allow deviations from zoning requirements relating to setbacks and lot coverage. This flexibility allows improvements and new construction to be built in harmony with the existing high-density development of the past. However, this type of development does not easily accommodate automobiles. The presence of the modern automobile can damage the image or flavor of an historic area. Reducing the amount of traffic in the district and providing off-street parking in a manner that hides the vehicles can enhance the purpose of a historic zoning district.

To increase landowners' willingness to comply with requirements of a historic district and to foster restoration, the governing body should complement the land use regulations with incentives such as participating in programs that provide tax credits or funding for historic

preservation and restoration.

D. DESIGN REVIEW

Some communities are also setting architectural design requirements for development other than in historic districts. In commercial areas, for example, new development can be required to include landscaping, or to use design features to avoid the "box look" of more typical commercial structures. A design review board must approve the developer's site plan and building design. Often, a zoning ordinance can allow some benefits such as increased densities or deviations from setback or parking requirements, which are incentives for developers to meet design requirements.

E. PROTECTING VIEWS

Communities are increasingly considering attractive views as assets worth preserving. A number of reasonable requirements can be imposed to protect views: limits on heights and locations of buildings, fences, other structures or hedges on lots, angled building positions, and varied lot widths and setbacks. On valuable (and costly) sloped building sites, measures can be taken to protect everyone's view. The degree of slope is a key factor in determining the distance between lots and between structures to protect everyone's view. Steeper sloping land allows greater heights of, or less separation between, structures. Gently sloping land creates the need to restrict heights or require greater setbacks or larger lots in order to preserve views. Also, on gentle slopes, setbacks can be varied, houses placed at angles, and lot widths varied to provide views or reduce monotony.

Views can be effectively protected by scenic easements, where the property owner agrees (perhaps for compensation) to certain restrictions on future development.

F. PLANNED UNIT DEVELOPMENTS

The planned unit development (PUD) is a development concept in which the developer has flexibility to use innovation and creativity in the design and layout of a development. Typically, PUD design emphasize larger amounts of open space, wider use of common space and facilities, constructing roads and other improvements in relation to topography and natural features, promoting public safety and convenience, and lower costs of housing. Smaller and clustered individual lots, interspersed open areas and narrower roads are often used to focus on open space as one of the attractive features of a PUD.

In recent years these features are being creatively incorporated to provide affordable housing that offers privacy, and attractive and pleasant dwelling units. A mix of residential types and commercial uses can be incorporated.

Local regulations can include a PUD section that offers flexibility in certain standards, allows creativity in design, and promotes economical services and construction, enhances open space, and protects unique natural features. The standards most commonly permitted to be modified are set backs, residential densities, road widths, lot sizes, and design of off-street parking. Regulations should place emphasis on planning and design to ensure that real benefits will result from the offering of flexibility in design and layout. Many local regulations require that to be eligible for review as a PUD a development must promote clustering of individual building lots and achieve one or more of the following:

a. Preserve natural features, historic sites or wildlife habitat.
b. Preserve productive agricultural land.
c. Provide economies in installing public facilities.
d. Provide affordable housing.

Planned unit developments can be very attractive and functional and be designed to be more compatible with topography and natural features and offer more affordable housing than can conventional developments. Local officials should ensure that innovations in design do not adversely affect the public health and safety. Benefits that result from the offering of flexibility should accomplish more than just allow a developer to reduce costs of land and improvements.

APPENDIX D

DRAFTING TECHNIQUES: FOSTERING AFFORDABLE HOUSING IN LAND USE REGULATION

Although a number of factors contribute to the high cost of housing, the rising cost of land for building sites is one significant aspect of increasing costs for new housing. Local governments cannot increase the fixed supply of land, but they can take steps to increase the supply of **buildable** land. Increased availability of buildable land and reduced land costs can be provided by allowing higher residential densities, smaller minimum lot sizes, smaller front or side yard setbacks, flexible site planning, and adequate quantities of land for manufactured, modular, and multi-family housing development. These measures can help promote affordable housing.

A. ENSURING ADEQUATE LAND IS AVAILABLE FOR AFFORDABLE HOUSING

A community can properly limit mobile homes and multi-family housing to certain areas. However, it is crucial that those areas where low cost housing is allowed contain enough suitable buildable sites to meet the affordable housing needs within the community. Drawing boundaries of the zoning district is critical because not only must a sufficient supply of land be available, the location should be in areas that are **suitable** for residential use. The Montana Supreme Court has affirmed this principle by ruling *(Martz v. Butte-Silver Bow Government)* that a community's zoning regulations must provide a reasonable amount of land on which mobile homes may be placed. Local officials can use data on the local population, numbers of households and percentage of mobile homes to project the number of mobile home housing units needed within the community. The projected need for mobile home units will indicate the need for available acreage to accommodate those mobile homes.

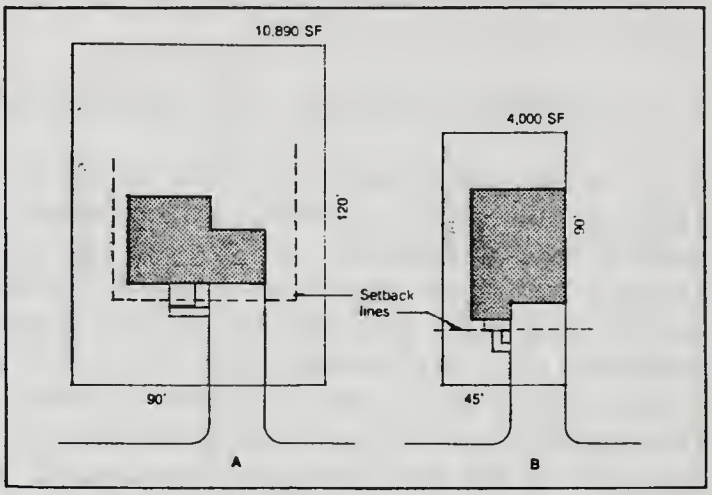
B. REMOVING BARRIERS TO AFFORDABLE HOUSING

The cost of a lot served by utilities typically constitutes 25 to 33 percent of the total cost of the house and lot. Not only is land a significant portion of housing costs, the provisions dealing with land (minimum lot size or frontage, yard setbacks, and densities) in land use regulations usually have more impact on housing costs than any other regulatory provisions. In addition to increasing the cost of building sites, large lot, low-density housing developments increase the cost of extending streets and utilities.

The most significant regulatory factor in lowering housing costs usually can be achieved by reducing lot size. Most land use regulations reflect the modern trend of allowing only large minimum lot sizes in most residential areas. However, many communities are finding that home buyers and the general public are increasingly accepting smaller-lot development, especially as the crisis of affordable housing becomes evident. Small-lot development not only decreases the cost of each house, it also reduces the linear footage

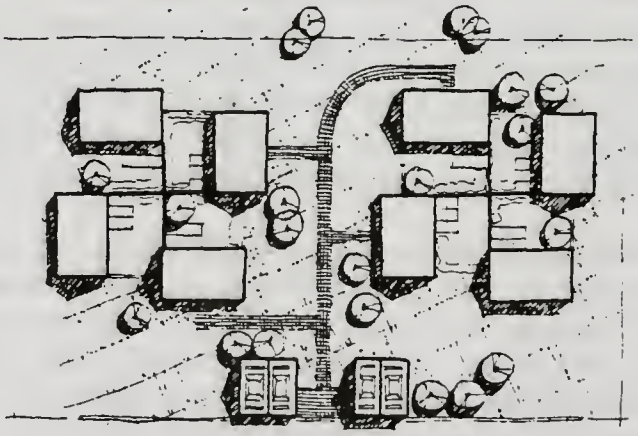
of streets, sidewalk, curbs, gutters, and utilities, and it offers savings in site preparation costs.

Land use regulations often specify minimum front-, side- and rear-yard setbacks. Usually these yard requirements can be reduced to offer considerable savings and increasing the buildable area of the lot. Houses typically are located in the middle of the lot. By siting the building perpendicularly or at an angle to the street, developers can reduce lot widths and side-yard setbacks and achieve a corresponding reduction in lot size. Front- and rear-yard requirements can often be reduced. A shallow front-yard setback can be complemented by requiring rear parking facilities with an adjoining alley. A rear alley can not only provide utility easements, but can also provide access to off-street parking, thereby reducing the number of curb cuts needed along the street.



Comparison of (A) conventional and (B) small-lot siting of houses

Houses can be set back from the street at varying distances and can feature alternating designs that break the monotony of repetitious garage doors and off-street parking areas. Also, housing units can be clustered, or placed in a "pinwheel" arrangement, with each home opening on a different view from the neighboring units.

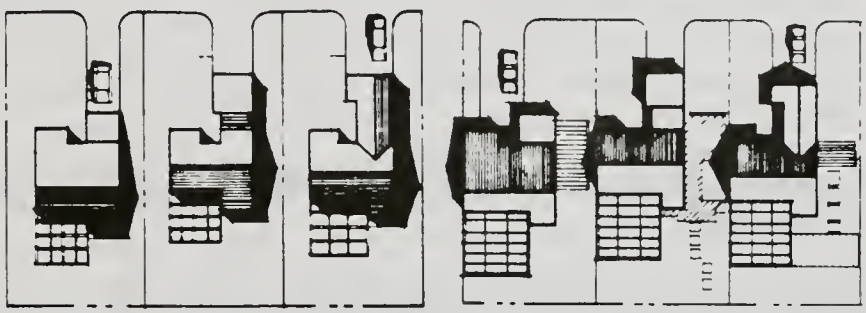


Typical "pinwheel" lot arrangement

There are a number of ways that well-planned, higher-density, small-lot housing developments can maintain community aesthetics and livability. For example, open space can often be increased to preserve attractive natural features and to achieve a feeling of spaciousness. Privacy can be preserved by requiring the proper siting of fences and plantings. Rear yards and front entry courts can be enclosed. Unobtrusive parking can be provided in garages or behind planted islands.

Zero-lot-line siting is one useful means of making efficient use of small lots. Under this approach, housing units are allowed to be located on one lot line, making full use of available space by creating a single, usable yard rather than two narrow, unusable side yards. Garages can be placed at either the front or back of the house instead of at one side. To achieve privacy, regulations can prohibit the installation of windows in walls located on lot lines. Usually main living areas are oriented toward the side yard, capitalizing on the open area.

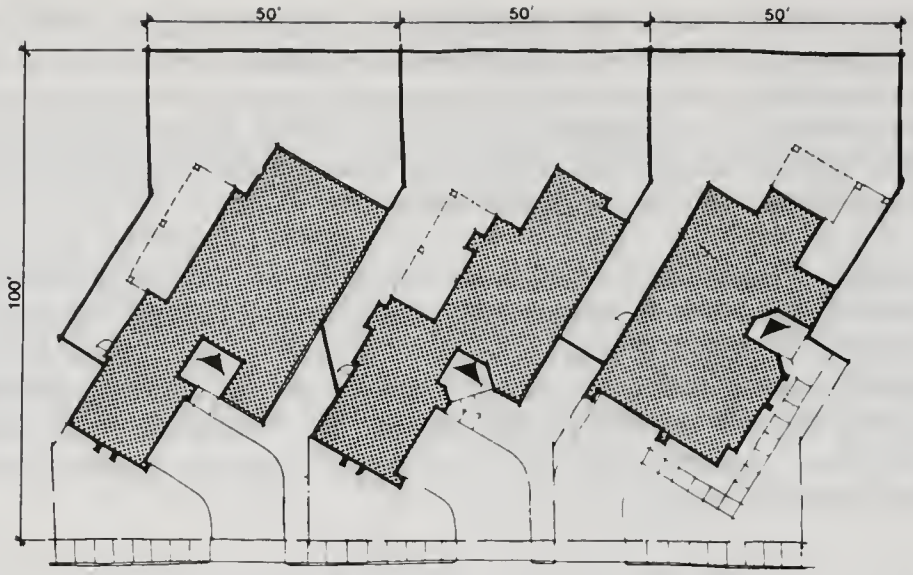
(A) Conventional siting practice
(B) Zero-lot-line siting



A B

An adaptation of the zero-lot-line design is a concept called "Z" lots in which lots are angled, so as to allow wider frontages and expose more of the home to the street. Because of the angle, garages do not dominate the streetscape as much as they do when located on conventional rectangular lots, especially if garage door locations are alternated from one house to another, or if garages are set at an angle to the homes and the street.

Typical "Z" lot



C. ENCOURAGING OR REQUIRING DEVELOPERS TO PROVIDE AFFORDABLE HOUSING

As explained in Chapter VIII, a primary cause of the shortage of affordable housing in many areas of Montana is a rapid influx of people who are able and willing to buy, rent or build high-cost housing. The high demand for higher-cost housing is inflating rent rates and home purchase prices at all levels. In these rapid growth areas most of the developers and builders are focusing on the strong market for high-end housing because it yields a better profit margin. Therefore, little or no low-cost housing is being built.

Because developers and builders are realizing significant financial benefits from high-cost housing, it is reasonable to expect them and their consumers to help mitigate the affordable housing shortage they have at least partly created. Some communities are requiring that developers include a percentage of affordable housing units as part of each development proposal. Such a requirement can be incorporated into local land use regulations, but the regulations probably should also offer flexibility in design as previously described to help developers plan and provide well-designed affordable housing.

Another approach could be to encourage, rather than require, developers to build affordable housing through land use regulations that incorporate a point system. Just as a point system can discourage development on productive agricultural land, or can encourage development in or near existing communities, a point system can encourage affordable housing as part of a development proposal. An example of using points to foster construction of affordable housing is provided on page 29.

D. STREAMLINING AND IMPROVING REVIEW PROCEDURES

On the theory that "time is money," many people suggest that local governments can foster affordable housing by reducing the review time and application requirements of development proposals. One incentive to encourage lower-cost housing is to allow an expedited review of development proposals providing affordable housing.

Local officials should examine existing or proposed land use regulations to see where opportunities might exist to shorten time frames, such as those between publishing a notice and holding a hearing, or between the hearing and the required action by the permitting officer or the board of adjustment. Application forms should also be reviewed to identify and clarify or eliminate ambiguous or unnecessary requirements for information.

Most traditional land use regulations evolved to achieve one or more benefits for the lot owner and the general public. For example, minimum lot sizes and frontages, yard requirements, height limitations and density limitations preserve adequate light and air, and privacy, and reduce congestion and fire danger. Therefore, reducing requirements for developing sites and structures should only be adopted in conjunction with corresponding design techniques to overcome the potential loss of these benefits. Developments proposing to use these design methods in order to provide affordable housing should not be permitted as a matter of right. Rather, they should be reviewed as conditional uses (such as planned unit developments), which will allow the permitting body the opportunity to ensure that the proposed development incorporates innovative and thoughtful design that will make higher-density, smaller-lot housing livable and pleasant and compatible with the general public interest.

Restrictions on land use and structures have a greater effect on housing costs than do procedural requirements. While reducing excessive review times is beneficial, local regulations can provide sufficient time for proper review of an application without causing substantial increases in development costs.

E. PROVIDING TECHNICAL ASSISTANCE TO DEVELOPERS

Through their planning or community development offices, communities can offer technical assistance to help developers better understand how developments can be designed to foster more affordable housing. In addition, local officials can conduct workshops or speak to developer or real estate associations, or the local Chamber of Commerce. This assistance role must not be confused with, nor interfere with the local government's regulatory function in reviewing and permitting development proposals. Where the permitting and advisory roles are performed by the same persons, it is even more important to clearly distinguish between the two functions.

APPENDIX E

BRIEF HISTORY OF LAND USE REGULATIONS

A. UNITED STATES

1. Subdivision Regulations

The subdivision of land for urban development is a natural aspect of a modern industrial society. In the United States, state and local governments adopted subdivision control laws in response to the harmful consequences of the premature subdivision of land that occurred in the late 1800's and early 1900's. During that period in American history a boom in land speculation resulted in the dividing of large tracts of agricultural and forest lands into small urban parcels.

Extensive land speculation fostered premature subdivision of land, tied up large amounts of capital for unproductive periods of time, increased property taxes and special assessments, and raised utility costs and maintenance costs. Unsafe and poor quality housing developments were also a consequence of haphazard growth. Lots were created that were not served by usable roads or by proper water and sewer systems or that were created in unsuitable locations, such as in areas that regularly flooded. Correcting improperly designed subdivisions often proved to be difficult or impossible.

Historically, subdivision regulations developed as a means of responding to these problems. Subdivision regulations were drafted to give local governments some control over the way land was platted and converted into building sites.

The U.S. Department of Commerce published the Standard City Planning Enabling Act in 1926. The Act initiated the concept of subdivision regulations serving as a legal means for a municipality to influence orderly land development.

Nationally, subdivision regulations have evolved through several phases. From the early 1900's when subdivision control laws were concerned with platting and recording, state and local governments began using subdivision regulations to ensure quality development and to shift the cost of improvements to the developer. After World War II, local governments shifted their emphasis to adopting regulations that required dedication of open space, recreational areas or school sites as part of developments. Since the 1970's subdivision regulations have also served to mitigate the impacts of growth on community services and the natural environment.

2. Zoning

Zoning originated in part as a means of protecting the health and safety of the inhabitants of major cities. Many rooms in tenement houses lacked direct sunlight or air. Diseases

such as tuberculosis spread rapidly. Fire spread easily from one large adjacent building to another. Such conditions led to the adoption of early tenement housing laws, which required that most rooms have direct access to light and air, and imposed height and setback requirements designed to help contain fire and to allow light and air to filter among the buildings.

As early as the 1800's, city governments in America were prohibiting slaughterhouses from being located in residential neighborhoods to prevent odor and noise problems, and requiring adequate spacing between buildings to prevent the spread of fire. These early restrictions on land uses benefitted both the general public and private property owners. Modern zoning regulations still focus on preventing problems by separating incompatible uses and by requiring uses to meet standards that protect both the public and private property owners.

Two events in the 1920's provided the primary impetus for the adoption and enforcement of land use regulations. The first was the publication in 1922 of the Standard State Zoning Enabling Act by the U.S. Department of Commerce. Eventually this model law was adopted by all 50 states in basically its original form.

The second major stimulus to the adoption of land use regulations was the 1926 U.S. Supreme Court decision in the case of *Village of Euclid v. Ambler Realty Co.*, which upheld the constitutionality of zoning. The decision not only upheld the right of local governments to set requirements and limits for building and land use, it also set a major precedent by upholding the concept that different land uses can be incompatible and should be separated from one another.

The original zoning ordinances focused mainly on type of use, density or intensity of development, and bulk and size of structures. Since those early years, land use regulation has expanded in application and become more flexible so as to accommodate the need for rezoning, when local governments' predictions of future land use patterns proved to be incorrect.

B. MONTANA

1. Subdivision Regulations

Montana enacted its first enabling law for subdivision control by cities and counties in 1883. That act, entitled "Plats of Cities and Towns and Additions Thereto", gave local governments control over surveying and platting of townsites and subdivisions.

In response to statewide concern about unregulated land divisions, the 1973 Legislative session passed the Montana Subdivision and Platting Act (MSPA), which gave local governments more comprehensive control of surveying, platting and subdivision design. The MSPA requires that local governments adopt and enforce local subdivision

regulations. It extends local government review authority beyond concerns for platting, surveying, and subdivision design to the provision of public services and impacts on the environment and the community.

The MSPA contained several exemptions that allowed 90 percent or more of the land divisions in Montana to legally escape local review. A land subdivision requiring local review and approval was defined as a division of land into a tract or tracts of land of less than 20 acres. Also, the law allowed creation of one parcel per year without local review under an "occasional sale exemption." These and other exemptions have allowed landowners to create thousands of tracts in Montana without subdivision review.

In 1993 – 20 years after the original enactment of the MSPA – the Legislature significantly reformed the subdivision law by eliminating the occasional sale exemption and changing the definition of a subdivision tract to include parcels of less than 160 acres.

To ensure safe sewage disposal and adequate water supplies, the Legislature passed the Montana Sanitation in Subdivisions Act in 1961. For divisions of land into parcels less than 20 acres in size, the developer must have water, sewer, solid waste and drainage plans reviewed and approved by the Department of Health and Environmental Sciences prior to filing the plat or survey with the county clerk and recorder.

2. Zoning

The Montana Legislature enacted the Municipal Zoning Enabling Act in 1929, authorizing cities and towns to adopt local zoning ordinances. The state enabling statute was virtually the same as the Standard State Zoning Enabling Act that had been published by the U.S. Department of Commerce seven years earlier. In 1934, the Montana act was challenged and the Montana Supreme Court upheld the constitutionality of the enabling statute. Currently, a majority of municipalities in Montana have adopted some form of zoning regulations.

In 1953, the Legislature passed the County Planning and Zoning Commission Act, which authorizes county commissioners to adopt land use regulations for an area containing at least 40 acres upon a petition of 60 percent of the property owners in the area. The constitutionality of that statute was upheld by the Montana Supreme Court in 1961. Dozens of planning and zoning districts have been created in Montana and land use regulations adopted to govern land use in those districts. The County Zoning Enabling Act, which authorizes county initiated zoning based on a comprehensive plan, was passed in 1963 and significantly amended in 1971.

Historically in Montana zoning was used primarily in cities, but in the last 15 years it has been adopted in suburbs, small cities, and towns. The Montana Planning Enabling Act and the two county zoning enabling acts specifically prohibit regulating the production of

agricultural, timber and mineral products (the county planning and zoning commission statute does not prohibit regulation of mining). This exemption reflects the historic importance of these natural resource industries to Montana, and the concept that land use regulations are intended to govern urban uses – residential, commercial and industrial.

APPENDIX F

EXAMPLES OF STATEMENTS OF INTENT

This Handbook has emphasized the importance of drafting clear statements of intent to guide local officials and the public in understanding the meaning and purpose of certain sections of a land use regulation. Below are two examples of purpose statements relating to different commercial districts. Because of the importance of a clear policy regarding nonconformities, the third example addresses the issues of nonconforming lots, uses and structures. The fourth sample statement of intent relates to sign regulations.

A. CENTRAL BUSINESS DISTRICT (CBD)

1. Statement of Intent

The Central Business District is intended to be the central focus of the city's business, government, service, and cultural activities. The uses encouraged in this district are those that are appropriate in a high density, intensively developed commercial area, with a compatible mix of multi-family residential use. Appropriate area should be provided for the logical and planned expansion of and renewal in the historical core of the community. The area should be developed as an attractive, functional and convenient commercial environment, and to provide the mix of activities necessary to maintain the downtown character.

B. HIGHWAY COMMERCIAL DISTRICT (H-C)

1. Statement of Intent

The Highway Commercial District is intended to accommodate business and light industrial uses that require more space than is normally available in general commercial districts or in the Central Business District, or whose operations require access to the major transportation facilities serving the community. The district should accommodate these uses while preserving the traffic-carrying capacity of the road system and the quality of the surrounding environment.

C. NONCONFORMING LOTS, USES, STRUCTURES

1. Statement of Intent

a. Certain lots, structures, and uses of land and structures may exist which were lawful at the time this regulation was adopted or amended, but which would be

prohibited or regulated under the terms of this regulation or future amendment. The intent of this section is to permit these nonconformities to continue until they are removed, but not to encourage their long term survival. This regulation further intends that nonconformities not be enlarged, expanded or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district. Nonconforming uses are assumed to be incompatible with permitted uses in the same district.

b. To avoid undue hardship, nothing in this regulation requires a change in the plans, construction or designated use of any building on which actual construction was lawfully begun prior to the effective date of adoption or amendment of this regulation and which actual building construction has been carried on diligently.

D. SIGNS

1. Statement of Intent

Sign regulations are intended to promote and protect the public safety and welfare by regulating existing and proposed outdoor advertising signs, and outdoor signs of all types. The regulations are intended to protect property values, create a more attractive economic and business climate, enhance and protect the physical appearance of the community, and preserve the scenic and natural beauty of the area. It is further intended to reduce sign or advertising distraction and obstructions that may contribute to traffic accidents, reduce hazards that may be caused by signs overhanging or projecting over public rights-of-way, provide more open space, curb the deterioration of the natural environment and enhance community development. Nothing in this regulation is intended to interfere with constitutional rights related to free speech.

APPENDIX G

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1,250 copies of this public document were published at an estimated cost of $2.00 per copy, for a total cost of $2,500.00, which includes $2,500.00 for printing and $.00 for distribution.